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# **Sovereignty and Protection:**

## **A Study of British Jurisdictional Imperialism in the Late Nineteenth Century**

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## Preface

This book is an administrative and legal history concerned with the relationship between theory, in particular legal theory, and practice in the decision-making process of two British government departments in the late nineteenth century. The departments were the Colonial Office and the Foreign Office and the problem they faced was how to extend informal imperial control. So it is necessary to examine the relations between British colonial policy-makers in London (and sometimes on the spot) and their legal advisers. As it happened, this was a time when legal theory was evolving with respect to the nature of a protectorate and the use of foreign jurisdiction in uncivilized or semicivilized areas. So this work is also partly a history of the development from the point of view of international law of the system of foreign jurisdiction. The evidence for this evolution arises from the spread of informal British imperial control into Africa and the Pacific in the late nineteenth century. And since these two areas were the scene of increasing international competition it has been necessary to give some (although only brief) attention to European legal concepts and diplomatic arrangements as to the extension of empire. No precise terminal dates are logically appropriate for this study because of its very evolutionary nature but the focal period is the decades of the 1870s, 1880s, and 1890s when significant developments took place in the theory and practice of protection and foreign jurisdiction.

This is not a complete history of British foreign jurisdiction. Attention does not center on the exercise of such jurisdiction in sovereign states like the Ottoman Empire or China where a government that was civilized, although non-Christian, functioned and was recognized. Furthermore this study does not deal with the type of protectorate or protected state that evolved in countries such as India, the Malay Peninsula, Borneo, or Zanzibar;



in these cases, some recognition was given to the authority of the local, governmental structure, some acknowledgement was made by British authorities of the kind of society and civilization that functioned there, and so a British "resident" was supplied, at least initially, in a supervisory capacity. The areas in Africa and the Pacific where during these years important developments were occurring in the concept of protection can best be described in the language of British officials of the time—the areas were "savage," "barbarous," or "semicivilized," and sometimes there was no clearly recognizable governmental, administrative, or military authority with whom British officers could deal.

This is not a systematic review of the development of British protectorates in Africa or the Pacific. Nor has any attempt been made to deal chronologically with the development of jurisdiction in any of the protectorates. The intention has been to move from one significant development or problem to another, ranging from one protectorate to the next as circumstances dictate. Little attention is given to local developments or idiosyncrasies; and the problem of whether London-made policies were well implemented in each protectorate has also been largely ignored. Instead this is a study of the evolution of theory as developed by administrators and legal experts in London—that is to say, their ideas and concepts of the nature of a protectorate and of the duties of the protecting state. Admittedly theory seldom arises in limbo, removed from the existence of practical problems and so it is in this context that local events in Africa or the Pacific are relevant—only insofar as their very existence creates a need for a further exposition or development of theoretical concepts. A political history of the internal development of these protectorates is not presented. Furthermore the involvement in, and the administration of, parts of Africa by British chartered companies is a separate study and has been considered only indirectly to the extent that developments in company areas impinge upon or affect the development of the concept of protection.

Finally this work makes a contribution to the large volume of literature on the nature of and motives for imperial expansion. It argues for a further development of existing theories by add-

ing a new factor, or at least introducing greater refinement, to the humanitarian motive. This centers on the idea of law and order and the spread of Western concepts of justice. The imperial powers feeling a need to establish and ensure conditions of law and order in these "savage" areas were led to take steps of imperial expansion and the manner of doing so was shaped by the theory of foreign jurisdiction. This allowed Britain to assert the necessary jurisdiction and authority and so spread its informal empire.

This book arises out of a doctoral dissertation presented at Duke University in 1969. I am particularly indebted to my supervisor, Dr. Richard A. Preston of Duke University and I would also like to thank two other mentors there, Dr. Harold T. Parker, and the late Dr. William B. Hamilton. The latter's death is greatly lamented since he was so instrumental in initiating and developing Commonwealth studies at Duke. I am very grateful to the Duke University Commonwealth-Studies Center and its scholarship scheme which made my research possible. I am also deeply appreciative of the kindness and courtesy shown by the trustees and staff of the numerous public libraries where I have worked: the Perkins Library at Duke University; the Public Record Office; the British Museum; the Institute of Historical Research; the Institute of Commonwealth Studies; Christ Church College, Oxford; Rhodes House Library, Oxford; Birmingham University Library; the National Library of Scotland; Swansea University College Library; and Lincoln's Inn Library, London. In addition, a number of private individuals helped me complete my research with private papers and interviews: the Earl of Halsbury, London; the Viscount Harcourt, Stanton Harcourt; Lord McNair, Cambridge; and officers in the Law Officers' Department, London. And I want to commend Mrs. Craik for bearing so patiently with this manuscript and for putting it into readable form.

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September, 1972





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## *The Legal System*



## The Problem of Law and Order

At the present stage the debate over imperialism looks like one of those historical controversies that will never be resolved satisfactorily. It seems there will always be a conflict in interpretations about motives for imperial expansion. The economic factor seems to occupy a position of central importance but of recent years political and strategic factors have asserted an importance of their own. For the time being current social problems on an international scale seem to denigrate too much the importance and sincerity of the humanitarian motives that inspired various imperialists. Meanwhile psychologists seek to explain group motivations and reactions to imperial ventures; and even the biologists can try to shed light on the territorial habits of man. No one approach appears adequate but both synoptic and synthetic approaches also usually fail to satisfy partly on the grounds of misplaced priorities. Perhaps all the imperial historian can do is to reshuffle his cards, uncovering new or rediscovering old points of illustration to support one or more of the motives and other factors involved.

One factor in British imperial history that has not received full treatment is the legal and constitutional one. The pattern of historiographical interpretation has been as follows. Firstly, the narrative and political factor was isolated and explained. This generally involved some consideration of legal and constitutional developments but mainly from a chronological point of view. Writers avoided any serious treatment of the social, economic, and intellectual factors useful in explaining these legal and constitutional developments. Books written from the turn of this century through to the interwar period indicated this trend

clearly; for the legal and constitutional point of view one could take as the prime example the writings of the eminent commentator, A. B. Keith. Secondly, historiographical interpretations diversified to bring in full treatments of the economic, social, and intellectual explanations of the historical event under consideration. Finally, there followed revisions and syntheses. But one important gap remains, in that a full analysis of the points concerning legal and constitutional history has not been made. The economic, social, and intellectual setting of legal and constitutional problems has on the whole been overlooked. This book fills a part of this gap, providing some intellectual background to British imperial history through an examination of the administrative machinery.

The basic issues underlying a legal explanation of empire center on the development of international law and a refinement and modification of concepts like "sovereignty" and "protectorate." Definitions of "sovereignty" tend to be vague and general and in recent years the concept has been characterized increasingly as a legal fiction.<sup>1</sup> Also it is a concept the meaning of which has undergone many changes in accordance with variations in cultural and political trends. For example in the twentieth century, where political thought in the West has increasingly emphasized democratic principles, sovereignty has come to reside not in any one person or sovereign or even in a political institution but rather in the people in general. Sovereignty now arises from and is to be found in the popular will. Yet the situation is far from clear because, at least practically in the British case, sovereignty still seems to reside in Parliament except for a fleeting period at election time.

A simple, direct definition describes sovereignty as "supreme authority—-independent of any other earthly authority;—it implies independence all round, within and without the border of the country."<sup>2</sup> The ideas contained in this definition are almost directly derived from the writings of the French jurist of the

1. Francis H. Hinsley, *Sovereignty* (London: C. A. Watts & Co. Ltd., 1966), pp. 232-33.

2. L. Oppenheim, *International Law, a Treatise*, ed. H. Lauterpacht (8th ed.; London: Longmans, 1963), pp. 118-19.



sixteenth century, Bodin. But assertions in law of sovereign power are to be found before his time—for example, in Justinian's *Institutes*. Church-State conflicts in the Middle Ages can be clearly seen in the terminology of a struggle for sovereign power by pope and holy Roman emperor.<sup>3</sup> But with Bodin the way was opened for the assertion of absolute power by an absolute monarch—the sovereign asserting full sovereignty.

In opposition to this development, other theorists began to formulate restrictions on the sovereign's power—limitations imposed by the law, by a constitution, by a contract, by the will of the people. With these limitations arose a further question as to the divisibility of sovereignty—could a state have only some of the elements of sovereign power while another state exercised the balance of the sovereign power? It was this question which in the late nineteenth century proved most troublesome to British legal theorists investigating imperial problems.

By the twentieth century it became accepted that sovereignty was not absolute or unlimited in scope; for instance, the rules of international law, as indefinite and uncertain as they might be, were seen as setting limits on the sovereignty of a nation. Consequently it became easier to explain sovereignty in terms of domestic or internal law. So the sovereignty of a state could be explained "as the sum of the powers which are assigned to its officers and agents under its internal law"; and so far as foreign affairs were concerned, "its independence [was] the measure of its freedom from control by any external authority."<sup>4</sup> In the terms of this interpretation, sovereignty was divisible. Viscount Finlay, a lawyer with considerable experience in matters of international law, summed up the position as follows:<sup>5</sup>

It is obvious that for sovereignty there must be a certain amount of independence, but it is not in the least necessary that for sovereignty there should be complete independence. It is quite consistent with

3. For historical background see Bertrand de Jouvenal, *Sovereignty: An Inquiry into the Political Good*, trans. J. F. Huntington (Chicago: University of Chicago Press, 1959), chaps. x–xii.

4. James E. S. Fawcett, *The British Commonwealth in International Law* (London: Stevens & Sons, 1963), p. 89; see also Hinsley, *Sovereignty*, p. 26.

5. Viscount Finlay in *Duff Development Company, Limited v Government of Kelantan*, [1924] A.C. 797, at p. 814.

sovereignty that the sovereign may in certain respects be dependent upon another Power; the control, for instance of foreign affairs may be completely in the hands of a protecting Power, and there may be agreements or treaties which limit the power of the sovereign even in internal affairs without entailing a loss of the position of a sovereign Power.

But in the closing decades of the nineteenth century legal theorists, especially in England, were not so willing to make sovereignty divisible in that manner. For most of the century the attachment of European powers to the concept of sovereignty was at a premium and they applied it rigorously, perhaps obtusely, to all areas, European and non-European. In the latter case, as applied to Africa and the Pacific where indigenous contact with the system of politics, law, and war as developed in western Europe had been minimal, the concept of sovereignty soon revealed significant deficiencies. So it became the task of Western administrators concerned with these areas of colonial expansion to devise modifications in the concept. In this aspect European legal theorists and colonial administrators set the pattern of development in the direction of expediency earlier and more successfully than their British counterparts.

One of the prime functions of the government of a state is to provide a system of law and order to regulate the conduct of people residing within the territorial limits of that state. The alternative of anarchy, chaos, and violence has frequently been presented as a reason for people first combining to form a government. The argument can be carried further, as in the long-standing debate on the origins of the English Parliament, as to which came first, the legislative or the judicial function. Hans Kelsen, the European jurist, argues for the primacy of the law over legislative functions.<sup>6</sup> The law is more fundamental than and anterior to the political apparatus of the state. The centralization in the hands of the state of the functions involved in the application of laws has always preceded the centralization of the function of creating those laws (that is, by legislation).

6. For a general discussion on the relationship between law and the state see George W. Paton, *A Textbook of Jurisprudence*, ed. D. P. Derham (3rd ed.; Oxford: Clarendon Press, 1964), pp. 109-10, 305-06.

Long before special legislative organs come into existence courts are established to apply the law to concrete cases. . . . A legal community which has an administration and courts is a state, but a central organ of legislation is not an essential requisite of a state.<sup>7</sup>

Although these points are open to contention by both jurists and historians, agreement can be reached on the general proposition that the state has the duty to provide a system of legal control. The state must have the ability to exercise jurisdiction, power, and authority (terms which are to some extent redundant) over its inhabitants. For this it needs to create some kind of juridical structure—courts, judges and magistrates, and law enforcing agents. Apart from the body of customary (or common) law, special rules and regulations need to be developed prohibiting or punishing behavior against the interests of the community as a whole and of individual members. The initial concerns are to protect the life and property of the inhabitants, matters falling mainly within the field of criminal law, although some matters of civil law are involved.

Nineteenth century European lawyers and politicians considered that sufficient conditions of law and order had been established in their own domains; they regarded themselves as civilized communities, belonging to "a family of nations." But what of African and Pacific peoples? Could their "political" organizations be regarded as nations? Some were in a tribal state; their learning, their technology, their living seemed quite primitive. Europeans tended to regard those people as savage and uncivilized; the prevalent condition in their lands seemed to be anarchy and chaos. So European administrators and jurists faced new and difficult questions as to whether and to what extent their system of law and order and their concept of international law could be applied to those remote and uncivilized areas.

Psychologists today are still arguing about the existence of national characteristics but among laymen and the popular press there is a ready acceptance of the idea that the British have a great respect for law and order and a distaste for violence. The

7. Hans Kelsen, *Law and Peace in International Relations* (Cambridge, Mass.: Harvard University Press, 1942), pp. 145-48.

actual proof of the assertion that the British can be described as a law-abiding community, sharing a great sense of respect for their system of justice and willing to abide by a system of law and order, is still awaiting its political scientist or sociologist. Statistical evidence is not available to allow a conclusive proof as to either the British attitude, or, for comparative purposes, European attitudes. Consequently the historian resorts to his intuition and inclinations; he can note the impressions of contemporaries and weigh the views of other historians. Nineteenth and twentieth century Britain offers a number of well-known examples of "peacefulness." Probably the outstanding case this century was the attitude of the workers during the 1926 strike.<sup>8</sup> This was a particularly volatile situation where violent and bloody clashes could have been expected between the strikers and the enforcers of authority. Instead there was unbelievably little violence; the prevalent attitude was nonviolence, negotiation, perhaps resignation. As to nineteenth century England, the foreign historian, Halevy, was impressed by the peacefulness of England.<sup>9</sup> In comparison with the turbulence of revolutionary Europe, England was remarkable for its stability. He saw England in the early part of the century as the country in Europe most free from revolutions, violent crises, and sudden changes. In a similar vein England of the 1880s appeared peaceful and nonviolent. The fact that at that stage workers were beginning to resort occasionally to direct, forceful means to achieve social and economic objectives became so much more noteworthy by the very fact that until then the regular pattern of social communication between worker and employer had been by peaceful negotiation and compromise.<sup>10</sup>

A case in support of the proposition of British respect for a system of law and order and reverence for their system of justice

8. O. Kahn-Freund, "Labour Law," *Law and Opinion in England in the Twentieth Century*, ed. Morris Ginsberg (London: Stevens & Sons Limited, 1959), pp. 226-27.

9. Elie Halevy, *England in 1815*, trans. E. I. Watkin and D. A. Baker (2nd ed. revd.; London: Ernest Benn, 1960), pp. 387, 424-25, 590.

10. Helen M. Lynd, *England in the Eighteen-Eighties; toward a Social Basis for Freedom* (London: Oxford University Press, 1945), pp. 281-82, 417, comments on the new use of force to try to achieve change.



can be made when one looks at the attitude and actions of British administrators, especially concerning imperial policy. For example, in the nineteenth century, the rhetoric of government officials—legislators in Westminster, secretaries in Whitehall, colonial officers around the globe—was tuned to concepts of law and order. One of the touchstones of colonial government was the expression “peace, order, and good government.” It is true that these words were overused by administrators and politicians with the result that the language often took on the tone of cant, smacking of hypocrisy and insincerity—but not all the time. As so typically happens with rhetoric its frequent use leads eventually to an unconscious acceptance of and even belief in the concept expressed. It moulds a way of thinking which can be easily resorted to, especially when there is no positive or direct alternative or the options are too difficult to institute. The general attitude of nineteenth century British administrators, particularly those in London, can be viewed in this light; the words, “peace, order, and good government,” took upon themselves a sanctity and solemnity which was translated into a criterion and objective of the job of administration.

One cannot write off wholly as pious claptrap all the assertions of a civilizing mission which colonial administrators uttered. Take, for example, the words given in evidence to the 1837 House of Commons committee on aborigines: “Can we suppose otherwise than that it is our office to carry civilization and humanity, peace and good government, and, above all the knowledge of the true God, to the uttermost ends of the earth.”<sup>11</sup> The words may sound unduly sanctimonious, superior, and self-righteous. But they express well one strain of thinking in which the provision of civilized law and government and the establishment of the Christian religion were linked and together they bestowed a boon on mankind; and since Europeans had been blessed with this gift it was a duty placed on them to bring the more primitive peoples (as they saw them) into the mainstream

11. “Report from the Select Committee on Aborigines (British Settlements),” H. of C. No. 425, p. 76, Great Britain, *Parliamentary Papers* (hereafter *P.P.*) 1837, VII.

of civilization. Lord Grey, colonial secretary in 1852, summed up this approach: "To avert this [the extermination of the less civilized race], and by the enforcement of order to provide for the civilization and conversion to Christianity of these barbarous tribes instead of leaving them to be destroyed is a high and noble object well worthy of considerable sacrifice on the part of the British people."<sup>12</sup>

The theme of law and order was one of the points upon which agreement could be reached by the European colonizing powers. Although the competing interests of the independent European states provided many opportunities for clashes in the areas of expansion, it was also recognized by statesmen and administrators that the interests of their respective nations could often be best advanced by a concert of action in matters of common interest. The establishment of peaceful conditions in the lands of native peoples took a high priority in the list of fields where European nations were willing to try combined action in colonial endeavor. Whether each nation was activated by motives of further trade, strategic bases, or the vague, noble sense of humanitarian duty, overall colonial ambitions could always be positively assisted by general European cooperation in restricting and controlling the slave trade, kidnapping, piracy, gun-running, cannibalism, and intertribal warfare. The meeting of European powers at Brussels in 1890 is an obvious expression of this common interest. The resulting General Act demonstrated quite clearly that the European powers saw their role as being that of a policeman.<sup>13</sup> Questions of development were unimportant except as to the provision of communications which were of direct use in the policing role. The underlying theme was the necessity

12. Grey to Cathcart, February 2, 1852, "Correspondence Relative to the State of the Kaffir Tribes, and to the Recent Outbreak on the Eastern Frontier of the Colony," [1428], p. 259, *P.P.* 1852, XXXIII.

13. General Act of the Brussels Conference, 1889-90, with Annexed Declaration, in Lewis Hertslet, comp., *A Complete Collection of the Treaties and Conventions . . . Commerce, and Navigation; and to the Slave Trade* (London: Her Majesty's Stationery Office, 1840-1925), XIX, 278, hereafter referred to as Hertslet, *Treaties*; also see Lewis H. Gann, *A History of Northern Rhodesia: Early Days to 1953* (London: Chatto & Windus, 1964), p. 67.

of maintaining some system of law and order, no matter how elementary, over a large part of Africa. A sophisticated system certainly was not contemplated but life and property had to be made secure, violence and bloodshed had to be stamped out. This centered attention on the practice of slavery since it fomented so much of the usual, widespread turbulence and chaos. The preamble of the act highlighted this point, proclaiming that the European powers were

equally animated by the firm intention of putting an end to the crimes and devastations engendered by the traffic in African slaves, of effectively protecting the aboriginal populations of Africa, and of assuring to that vast continent the benefits of peace and civilization.

The European nations were formulating the problem in the true, liberal tradition that the state must try to assure the existence of those conditions necessary for the enjoyment by the individual of his life and rights; and in the default of these conditions being assured by local rulers the European powers themselves would try to rectify the situation.

This concern for law and order can be viewed as one facet of the nineteenth century philosophy of progress. Europeans were convinced as to the greatness of their civilization and they were struck by the appearance of superiority which their way of life displayed. Western Europeans seemed blessed by an unparalleled intellectual, economic, and social development. The concept of progress, the motivating factor of development, seemed to be a treasure held almost peculiarly by European peoples. And the nineteenth century British subject, basking in the industrial and colonial strength of Britain and empire, could feel more blessed than any of the Europeans. The British constitution, industrialization, science, and technology were taken to be instrumental in the development of British culture and civilization. By contrast the backwardness of African and Pacific communities was seen as arising from the simplicity of their political and economic ideas. It was widely assumed and believed by European administrators that this primitiveness could be overcome at



least partially by the introduction of European governmental and legal systems to these communities.<sup>14</sup> Modernization and refinement of life in those societies were seen as the direct and desirable result arising out of the introduction of a European presence. Indicative of this attitude was the speech of Frederick W. Chesson, secretary of the Aborigines Protection Society, given in 1875 before the Royal Colonial Institute:<sup>15</sup>

Civilization can only make real progress in the Pacific under the guidance of a powerful and united Empire—an Empire which is determined that human rights shall be respected wherever its authority extends, and that just laws shall be established in the remotest island which yields obedience to the sceptre of the Queen.

Chesson saw the establishment of law and order as being possible in the Pacific only if British sovereignty were established there.

He also illustrated well the typical attitude of the British towards their system of law. The British concept of “justice” had evolved slowly over the centuries and in British minds was marked by a fairness and impartiality unequalled by any other legal system. And, at least among the upper classes and to some extent generally throughout the population, there was a positive response to this seemingly unique British creation. They prided themselves on their system of law and jealously wanted to take it with them wherever they went in the world. In England, as in Europe, the prevailing attitude towards indigenous peoples was one of superiority and supremacy. Those people seemed backward and primitive; their culture seemed almost nonexistent and their organization—political, administrative, legal, and military—was generally regarded as inferior. It was little wonder that the British subject, nurtured by centuries of British government and justice, was unwilling to forego his British rights “in the wilds of remote Africa.” In particular he saw no reason why he should submit himself to the mercies of judicial systems

14. P. D. Curtin, *Image of Africa: British Ideas and Action, 1780–1850* (Madison: University of Wisconsin Press, 1964), pp. 245ff., discusses British attitudes to progress and its application to West Africa.

15. Proceedings of Royal Colonial Institute, 1875, p. 105, in John D. Legge, *Britain in Fiji, 1858–1880* (London: Macmillan & Co. Ltd., 1958), p. 139.

which native peoples had devised for the regulation of their own lives. Instead he wanted to remain subject to the clemency (and even harshness) of English law—or, at least, the law of some civilized, Christian state belonging to “the family of nations.” Yet so long as the British crown did not have sovereignty in those areas it was not possible as a basic rule of international legal theory for British jurisdiction to be exercised there.

Fundamental to the theory of sovereignty was the idea that a sovereign power was legally omnipotent within its own territory but was legally powerless within the territory of another state—*extra territorium ius dicenti impune haud paretur*.<sup>16</sup> In practical terms this was an assertion that British authorities had no jurisdiction or control over British subjects when the latter were in a foreign state; they had to submit to the judicial system of that state.<sup>17</sup> Consequently, a necessary condition for the institution of British jurisdiction, power, and authority over British subjects outside the existing British domain was the establishment of British sovereignty there. Foreign territory would have to be brought within the dominions of the crown. Obviously this was not easily achievable. So, to circumvent the problems created by this basic doctrine of sovereignty, various legal devices, such as extritoriality, were formulated to allow the assertion of some jurisdiction in foreign territories. As an example, one might notice the arrangements that the British had made by the mid-nineteenth century for the assertion of a vague jurisdictional authority in certain Gold Coast areas and elsewhere along the Guinea coast. These will be discussed more fully later.

In the last two decades of the century it was not only British colonial authorities who had to face the problem of the assertion of jurisdiction in Africa and the Pacific. Most of the leading Western nations, each inspired in part by a civilizing mission, had taken upon themselves the duty of introducing Western

16. The sentence of one adjudicating beyond his jurisdiction can be disobeyed with impunity.

17. Henry Jenkyns, *British Rule and Jurisdiction Beyond the Seas* (Oxford: Clarendon Press, 1902), p. 123; Oppenheim, *International Law*, pp. 286, 326; Francis T. Piggott, *Extritoriality: The Law Relating to Consular Jurisdiction and to Residence in Oriental Countries* (London: William Clowes and Sons Limited, 1892), pp. 4–5.

ideas and systems in both areas. Administrators of France, Germany, Italy, Spain, Portugal, and Belgium had to consider the easiest and surest means of establishing sufficient jurisdiction and authority there. And in doing this they had to give consideration to two aspects of the problem. Firstly, and more obviously, they needed to provide sufficient conditions of law and order for a national of the colonizing state to be able to receive the benefits, along with the penalties, of his own system of justice. Secondly, some consideration had to be given to the provision of a system of jurisdiction which would offer sufficient protection to native peoples against malefactors from the civilized world.

The difficulties that faced European administrators in their attempts to devise a sufficient system of jurisdiction arose primarily from the rapidity of expansion into the widespread, remote areas. Increasingly during the later part of the nineteenth century European infiltration consumed the vast expanses of the world previously ignored by the West. The expansion was not orderly; rather, it was a slow, often imperceptible, seeping action by small groups and individual adventurers—traders, merchants, missionaries, sailors, whalers, slave dealers, vagabonds, ruffians. Some were respectable and law-abiding, following the calling of money or of God. Others were the refuse of European society, all too ready and willing to indulge in wilful deeds of violence, outrage, or destruction. Often their actions were more barbarous than those of the “savages” among whom they had come to reside. And yet so long as adequate jurisdictional machinery was absent these subjects could perform such deeds with impunity.

Lord Glenelg, secretary of state for the colonies in 1837, offered a simple but apt generalization on the nature of frontier societies where physical expansion outstripped governmental control and supervision. “Opportunities of uncontrolled self-indulgence and freedom from the restraints of law and settled society, are, it would appear, in all countries, irresistible temptations to the inhabitants of the border land of civilization.”<sup>18</sup>

18. Glenelg to Napier, November 28, 1837, C.O. 48/172.

Glenelg saw avarice as the motivating factor which operated in such frontier areas. Such motives had always "compelled the strong to encroach on the weak, and the powerful and unprincipled to wrest by force or fraud, from the comparatively feeble and defenceless, wealth or property or dominion, richer pastures, more numerous herds, and a wider range of territory."

The need to control indiscriminate, lawless behavior by European subjects residing beyond the boundaries of civilized life was only one aspect of effective jurisdiction. European administrators also had to worry about affording to Europeans in remote areas sufficient protection from molestation and attack by natives or other Europeans. In effect, since the mother country usually had inadequate means to provide enough protection, it meant that the European settler or wanderer had to rely on his own means. No limits could be set on the amount of self-protection that the individual considered necessary to ensure the safety and protection of his own life, that of his kin, and the preservation of his property. The limits were a matter of individual choosing and the dividing line between adequate means of self-defence and the excessive and indiscriminate use of force to achieve one's objectives was set not by an independent, impartial force but by the interested European himself. Lord Grey, colonial secretary, saw the problem clearly.<sup>19</sup>

If colonists of European descent are to be left, unsupported by the power of the mother country, to rely solely on themselves for protection from fierce barbarians with whom they are placed in immediate contact, they must also be left to the unchecked exercise of those severe measures of self-defence which a position of so much danger will naturally dictate. Experience shows that in such circumstances measures of self-defence will degenerate into indiscriminate vengeance, and will lead to the gradual extermination of the less civilized race.

The problem, however, was not confined to the punishment of criminals although it was this aspect that attracted most attention in the public eye. In many cases civil remedies and reliefs

19. Grey to Cathcart, February 2, 1852, "Correspondence Relative to the State of the Kafir Tribes, and to the Recent Outbreak on the Eastern Frontier of the Colony," [1428], pp. 258-59, *P.P.* 1852, XXXIII.



were desired; and again European subjects hoped for the boon of their own legal rules and procedures.

Another factor shaping official attitudes was the problem of the treatment of natives. One approach was influenced by a humanitarian concern for the "less fortunate" people in "barbarous lands" and some Englishmen thought limitations should be placed on the way British subjects treated and affected those people. Some, such as the ardent campaigner for aboriginal causes, Thomas Fowell Buxton, recognized then that white civilization would bring not only benefits but also great problems to native peoples, destroying their institutions and way of life. A select committee of the House of Commons making between 1835 and 1837 a general survey of the problems of natives in British settlements and neighboring territories took the approach that the natives needed the protection of the British government.<sup>20</sup> So, for example, it was urged that a prohibition should be put upon the occupation and use by whites of native lands within British areas or nearby territories. In other areas any British subject who took land did so at his own peril and should expect no help or protection from the British government. The overall approach was that the government should avoid as much as possible any interference in native affairs. Certainly the situation was clearly stated that new territory should be acquired only with the consent of the British government.

A persistent problem confronted British advisers to which their response seemed almost contradictory. This concerned the question whether the natives were to be treated as equals with the European states. On the one approach it seemed apparent that a native society and a Western state could not be put on an equal footing in diplomatic matters. The former was so naive and ignorant in the ways of Western diplomacy and power politics that it could be taken advantage of too easily. So, in 1837, it was urged as a general rule that treaties with natives were inexpedient.<sup>21</sup> Treaties made by Europeans could always

20. "Report from the Select Committee on Aborigines (British Settlements)," H. of C. No. 425, pp. 76-79, *P.P.* 1837, VII.

21. *Ibid.*, p. 80.

be quickly turned to their own benefit with the natives failing to understand the full significance of the terms. "The treaties would be preparatives and the apology for disputes rather than securities for peace." To avoid future difficulties this approach emphasized the idea that contacts between Western countries and native peoples should not be expanded and complicated by European devices such as treaties but should be reduced to an absolute minimum.

The second approach required some degree of Western involvement and even interference to check native abuses and to ensure that ultimately Western justice, civilization, and Christianity were brought to them. They would have to be shown the advantage of British justice. In the case of those living within British territory it was not difficult for the British example to be set. At the same time it was urged that patience and indulgence be shown to them while their ignorance and prejudice was being overcome. In the case of those living outside British territory the 1837 report of the select committee recommended that treaties be made with the nearby tribes to ensure that some simple, basic form of justice be brought to bear on natives who were guilty of offences against British subjects.<sup>22</sup> A dangerous precedent would be established if such natives were allowed to escape punishment under their own system of customs and laws. So, according to this second approach, treaties of a limited nature were recommended, in the interests of British justice. The same considerations applied in British dealings with the slave trade in West Africa. The Royal Navy slave squadron alone could not effectively control the situation. So it was planned that treaties should be concluded with native chiefs to check trading activities in their own territory. Through such "judicious intervention" with "influential chiefs" it was hoped that Britain would be able to control the slave trade in West Africa.<sup>23</sup> In the 1840s this approach was followed up around Sierra Leone with

22. *Ibid.*

23. Thomas F. Buxton, *The African Slave Trade and its Remedy* (London: Cass, 1967), p. 287; Russell to Doherty, July 23, 1840, "Report from the Select Committee Appointed to Consider the State of the British Settlements on the West Coast of Africa," H. of C. No. 412, p. 424, P.P. 1865, V.

quite a degree of success. Increasingly, British policy mid-century seemed to accept the principle that such treaties, whether concerning justice or the suppression of the slave trade, could and should be concluded while the alternative of the inexpediency of concluding such treaties because of the inequality of the parties was neglected. In particular, the suppression of slave trade activities in West Africa stirred much of the British activity in the area, increasingly and inexorably leading to a greater involvement and interference on the part of British authorities.

At the same time, no matter how sympathetic the European imperial powers might be to the cry by Europeans for the need to establish a satisfactory jurisdiction and to the humanitarian arguments urging protection of native interests, the European administrators always found themselves beset by a range of practical problems. Expansion always seemed to occur too rapidly; Europeans seldom bothered to stay within the safe and legal boundaries of settlement but wandered further afield, seeking success, fortune, or adventure in the unknown and unregulated areas. For the colonial administrator the cost of the rapid extension of justice and other services was always too high, apart from the difficulty of finding a sufficient number of adequately trained personnel. Home governments were never inclined to be lavish in the provision of funds for such services.

These difficulties were primarily practical. But there also existed theoretical obstacles in the way of easy expansion into the yet-unclaimed areas of Africa and the Pacific. The theoretical objections centered on the concepts of sovereignty and extritorial jurisdiction.<sup>24</sup> Of course, administrators in the field did not concern themselves unduly, and sometimes not at all, with the refinements of international law and domestic law on these points. But in the European capitals the matter was of significant, if specialized, concern. By 1884, because of the increasing contact and occasional conflict between the European powers as they spread their influence throughout Africa and the Pacific, it was felt necessary to call a meeting of the interested powers to dis-

24. Note that the words "extra-territorial" and "extritorial" are used interchangeably.



cuss these problems of sovereignty and jurisdiction. The results of that meeting were not conclusive but the negotiations and discussions illustrated clearly the nature of the problem and defined the nature of the difficulties involved. It took another decade before British theory could be said to be approximating the approach taken by European theorists to the same problems.

The most obvious means of extending jurisdiction to another area was by annexation.<sup>25</sup> In that way the territory would become subject to the power and authority of the annexing government and all persons therein would automatically fall under the jurisdiction of that government. Laws and regulations could be made to regulate all aspects of life; waste lands would be at the disposal of the new administrators, and conditions of peace and order could be established on the European model.

Jurists normally differentiate five modes of territorial acquisition (or annexation). Subjugation or conquest is the method wherein possession of someone else's territory is taken by military force in time of war. The conquest alone does not transfer the sovereignty to the conquering state; this is achieved only after a formal annexation of the conquered state.<sup>26</sup>

Secondly, a state may agree to cede or transfer its territory (and sovereignty) to another state. The cession can be by arrangement in a treaty which can be the result of either peaceful negotiations or war. Obviously the ceding party must be a fully recognizable state in international law, otherwise it does not possess either sovereignty or the power to cede it. Generally it was held that native tribes could not make cessions that were the subject of international law. Indeed, the question of when a native tribal organization became recognizable as a state in international law was a topic of considerable legal interest and dispute during the nineteenth century.

A third method of acquiring territory is occupation, sometimes called settlement. In this case the territory can be occupied only

25. Mark F. Lindley, *The Acquisition and Government of Backward Territory in International Law* (London: Longmans & Co., 1926), chap. i; R. Y. Jennings, *The Acquisition of Territory in International Law* (Manchester: Manchester University Press, 1963), chap. ii.

26. Oppenheim, *International Law*, p. 567.

if it does not belong to a state. Occupation cannot arise if sovereignty already resides in some state. The most obvious example is the occupation of an uninhabited island, and during the nineteenth century many such islands in the Pacific came within the British dominions by virtue of occupation. But the method can also be used in respect of territory inhabited by natives whose organization is not such as receives recognition as a state. This, for example, was the legal position of British New Guinea in 1884. Occupation to be effective must be real occupation;<sup>27</sup> possession of the territory must be asserted, some formal procedure of annexation carried out, and a settlement or administration established that is capable of asserting the occupying country's control over the territory.

Partially similar to occupation is prescription. Lawyers disagree about the practical terms upon which this method operates but basically it requires a long, undisturbed exercise of control over the territory. The length of time is determined mainly by the fact of recognition by other states that the prescriptive state has acquired sovereignty over the territory. The fifth method of acquisition is accretion where territory is increased by new soil formations, such as alluvial deposits and new-born islands.

During the nineteenth century British expansion was very much a matter of conquest, cession, and occupation; the other two modes of acquisition were of little importance. Many groups and individuals urged widespread annexation. Frequently it was carried out and even more frequently was it discussed. Many people, especially in colonial areas, favored the annexation of nearby territory—an ever-expanding frontier. But in London there were numerous opponents to schemes of annexation. British administrators in Whitehall faced serious practical problems arising out of the rapid and widespread expansion into Africa and the Pacific as the century drew to a close. They found it impossible to keep abreast of the movement of British subjects into all corners of the world. The cost of creating in all these areas a network of administration and justice, no matter how

27. James, Herschell to Derby, December 11, 1884, C.O. 422/1/21136; Oppenheim, *International Law*, p. 557.

rudimentary, was prohibitive. The Treasury was ever disapproving of imperial schemes that involved appropriation from the public coffers—such Treasury influence in deterring annexations on the grounds of cost is a topic in itself.

A further factor which militated against rapid and widespread annexation of territory was the effect of the 1833 act abolishing slavery in British territory. Through making the holding of slaves illegal the act imposed new administrative tasks on British officials, especially with respect to African lands. To avoid costly and possibly difficult deeds of enforcement of antislavery provisions British officials not unnaturally argued that it was desirable to avoid annexation. Consequently, less direct methods of control took on a more appealing appearance with respect to African lands where slavery was practiced and where some British penetration was already taking place.

The obverse proposition to annexation was to ignore the unclaimed areas and to abandon to fate those British subjects who might pass through or reside there. They could try to institute their own system; they could try to integrate themselves into the system of any other group, native or foreign, that was resident there; or, more likely, they could come into friction with other resident communities in the same area. Then the British government would be begged to bail them out. Like annexation, this second proposition aroused centers of opposition. A basically emotional argument centered on the notion that a British subject anywhere had the right to enjoy the benefits of English justice, or at least the justice of some other civilized government. Whenever a British subject in "dark Africa" was denied that right there were bound to be howls of protest in London. The English newspapers were always ready to prosecute the cause of an English subject outraged in a primitive part of the world. And the newspaper stories would bring letters of protest to the editor and inevitable questions in the Houses of Parliament about the adequacy of the protection that the government was offering to its loyal subjects.

Not all the objections were conceived from a British point of view. There were humanitarian groups, in England and in co-

lonial areas, whose policies aimed at the protection of the more primitive native peoples of the world. But they did not envisage protection as meaning a disregard or avoidance of these peoples. Generally the humanitarians saw the natives as children, simple and innocent, falling an easy prey to the wily schemes of civilized but unscrupulous Europeans. So they urged that, in the interests of the natives, the British government should assert some kind of guiding and perhaps even controlling role. Throughout the nineteenth century British humanitarians played a vital, continuing role in drawing attention to the evils of slavery. They helped secure the abolition of the trade in Britain in 1807 and achieve a European condemnation of it at the Congress of Vienna, 1814-15.<sup>28</sup> Thereafter they persisted in their attempts to eradicate the problem and kept up pressure, often successful, on the British government to interfere in Africa and the Pacific. Frequently, indeed, it was local slave-dealing and trading that induced British officials to take practical steps to increase their control and authority over native areas without proceeding the full distance to annexation.

From the middle of the nineteenth century onwards a third solution to the problem of establishing sufficient jurisdiction was being worked out and applied in Africa and the Pacific; by the closing stages of the century it was fairly well settled. It was a compromise between the extremes of annexation and disregard of the area. It offered an indefinite means of control, a somewhat shadowy amount of jurisdiction and administration, but it was sufficient to satisfy at least the more direct demands for the protection of British subjects and of "helpless savages." But this solution—jurisdictional imperialism—was reached only very slowly and by faltering steps. The term "jurisdictional imperialism" had no exact meaning but signified that the authority that the British had in a particular area was a limited one. The limitations were those as fell within the scope of the foreign jurisdiction legislation. Initially, in the early part of the nineteenth century, this meant that Britain was granted authority mainly

28. Jerome Reich, "The Slave Trade at the Congress of Vienna—a Study in English Public Opinion," *Journal of Negro History*, LIII (1968), 129-43.



with respect to external affairs and the slave trade, while acquiring a duty of protection. There were some slight variations on this. By the end of the century, however, the degree of authority that Britain was acquiring in new areas of protection had expanded considerably, as will be shown within. At the same time, throughout the whole of the nineteenth century, there were significant limitations on the amount of authority that Britain could exercise in the areas of jurisdictional imperialism. It was a lesser degree of jurisdiction or authority than the one that arose through imperialism by annexation where full control over all matters, internal as well as external, of a particular territory was taken by the annexing power. So jurisdictional imperialism indicated, in fact, that further steps would be necessary before a complete jurisdiction as exercisable through annexation would be attained.

In the areas of jurisdictional imperialism the initial concern was the establishment of sufficient criminal and civil jurisdiction over British subjects. By the 1890s, however, this problem had expanded into a consideration of broader import, raising questions as to the extent to which European powers could exercise general administrative authority in the native areas of Africa and the Pacific. Looking at the primitive life of people in these areas where governmental theory and structures appeared almost non-existent, European administrators moved logically from the consideration of jurisdiction to the wider claim of the exercise of general powers of administration and regulation, affecting not only their own nationals but also the citizens of other civilized states and natives of the area itself. This claim, in turn, led to assertions of control over the land of the area. But these claims raised questions of great legal difficulty. Did the native peoples or their rulers possess a sovereign power which could exclude European states from assuming jurisdiction and administrative authority over all people in the area? What was the relationship between the native "state" and the European state as the latter increasingly assumed jurisdictional and administrative powers in the area? These were fundamental questions about the nature and exercise of government. The answer supplied by the tra-

ditional English doctrine of sovereignty proved to be too inflexible and unsatisfactory for practical needs. Modifications were necessary and were slowly introduced into the law to bring it into line with requirements of expediency and good administration. And these gradual changes in the law in England enabled colonial administrators to move towards the establishment of a system of justice where conditions of law and order could be more readily afforded.

The usual procedure adopted by administrators wanting to remedy the lack of British jurisdiction in these areas was to appeal to the British Parliament for corrective legislation. A considerable volume of legislation developed under the category of foreign jurisdiction. When the Foreign Office found it necessary to provide means for an extension of British authority in foreign, uncivilized, or primitive areas it was normally done by an amendment to the Foreign Jurisdiction Acts or by the issuance of an Order in Council under that legislation. But the Colonial Office often chose to avoid this type of enabling legislation because it seemed to be basically a Foreign Office preserve. Implementation of the legislation usually fell within the scope of British consular officers stationed near the affected primitive areas and these officers were responsible to the Foreign Office and not the Colonial Office. Instead the latter could seek special parliamentary approval for any extension of jurisdiction, asking for a particular act for the particular territory concerned. At the same time it should be borne in mind that on several occasions the Colonial Office did arrange for the issuance of an Order in Council under the Foreign Jurisdiction Acts to cover jurisdictional problems near one of its colonies. On these occasions the exercise of jurisdiction was vested in a nearby colonial agency, such as its legislature or chief executive officer.

The Colonial Office, in fact, was caught. It could use the regular basis of foreign jurisdiction legislation which did not require parliamentary approval or it could get special parliamentary authorization through legislation. In most of its business the Colonial Office traditionally displayed an abhorrence towards raising any colonial matter before Parliament. On the whole,



however, this attitude was unwarranted especially since, in fact, its legislative measures usually drew no comment and rarely any criticism when raised in Parliament. Furthermore, with regard to problems of extritorial jurisdiction, the Colonial Office was even less likely to be subject to searching parliamentary inquiry and scrutiny since these problems, by their very nature, were sufficiently specialized and so complicated that few politicians in either House understood what was involved or where valid or useful criticism could be made. There were, of course, some exceptions such as Sir William Harcourt, Liberal politician and eminent international lawyer,<sup>29</sup> but generally even the legally qualified members evinced little knowledge or interest in these matters. The occurrences which sparked Parliament into activity, sometimes quite frenetic, over a question involving principles of extritoriality were occasional atrocities or barbarities committed by British subjects on natives or more certainly when natives reacted violently to European encroachment. Then the public expected action and the Colonial Office or the Foreign Office sought to placate opinion by devising an appropriate means of exerting British jurisdiction. In these cases it is obvious that the human interest element, even the vulgar indignation of the outraged Englishman, was the motivating factor, while the principles of extritoriality were of secondary importance.

The spread of British "influence" and jurisdiction was in most cases the work of the man-on-the-spot, acting of his own initiative. The most unusual case of this concerns the absorption of Sarawak into the British sphere. In 1841 James Brooke received the government of Sarawak from the Sultan of Brunei. By stages, Brooke as Rajah came to assert a full independence, acting as a sovereign in his own right over the territory. In 1863 the British government recognized Sarawak as an independent sovereign state. At the same time, Brooke still considered himself a British subject and requested that a British protectorate be established over his lands. Such double-headed citizenship was very anomalous at law but that problem does not concern us. The Sarawak

29. Harcourt, see Appendix.

case was not, in fact, an example of the operation of British extraterritorial jurisdiction since Brooke acted in a sovereign capacity; in practice, however, Brooke followed English law for British subjects as much as possible. So a British influence was established—through the extraordinary means of a British subject acquiring sovereign (or at least quasi-sovereign) powers. Finally, in 1888, British protection was bestowed on Sarawak as an independent state with Charles Brooke as its ruler. The more usual method of establishing British influence arose through the arrival of a few British subjects in a new territory. In time they would ask for British protection, and a treaty or some such agreement would be made between the local head-man and the visiting British consul or such official on behalf of the queen. It was a transaction between the local government and the British government wherein some degree of official British presence was acknowledged.

It is common for historians when considering the process of decision-making to take a pragmatic approach and assert that each problem is solved on its own merits. So, it is argued, in government departments like the Colonial Office or the Foreign Office, theoretical considerations were eschewed; the decision reached was usually based upon common sense, the intention being to find a practical answer for an actual problem that had arisen. This approach is basically correct; but it has one failing in that it leads to a tendency to ignore, or at least to gloss over, some of the theoretical concepts that may have influenced the decision-makers.

During the 1880s and 1890s—the period which historians have delighted to name “the scramble for Africa”—a number of annexations were made by Great Britain and the British Empire spread all over the globe. The annexations were mainly in southern Africa—British Bechuanaland, the eastern extensions of Cape colony such as Tembuland, Bomvanaland and Galekaland, and north of Natal in Zululand, Tongaland and other nearby territory. In the Pacific, British New Guinea was annexed. But, indeed, the greatest extensions of empire were informal—especially in the Niger basin, elsewhere in West Africa, in East Africa, and in

Central Africa. These extensions were sometimes called "protectorates," sometimes "spheres of influence," and sometimes had no adequate name. The words, "British Empire," as such, had no definite legal meaning in English law although the concept of "empire" was comprehended in such established legal phrases as "Her Majesty's dominions" and "sovereignty." And, initially, the more informal type of expansion, as contained in the concepts of "protectorate" or "sphere of influence," had no settled meaning when applied to areas of expansion in Africa or the Pacific.<sup>30</sup> The notion of a "protected state" or "protectorate" in international law described the case of a civilized, Christian European nation accepting the protection of another power; for example, the Ionian Islands became a protectorate of Britain in 1815. But it did not follow that that kind of an arrangement could be applied directly to the local conditions pertaining to the areas of expansion outside Europe in the 1880s and 1890s. Furthermore the very indefinite concept, "sphere of influence," did not gain currency among the European powers until the General Act of the Berlin Conference of 1884-85 and subsequent agreements between European powers where, to avoid conflict among themselves, they demarcated zones of influence.

In the closing years of the nineteenth century, through increasing usage, the two concepts, "protectorate" and "sphere of influence," began to take on a more precise meaning. The essence of this meaning was embodied in legal concepts. In fact, a sphere, although not precisely defined, was taken to have significance in international relations in the sense that one European nation had a prior interest in the area to the extent that no other European power should interfere. A sphere was arranged by treaty or some such agreement with other European powers and usually applied to territory adjoining or to the hinterland of a colony. The arrangements did not specify the kind of authority or control that the European power could exercise in the sphere.

30. William E. Hall, *International Law* (Oxford: Clarendon Press, 1880), pp. 22-24; also see Richard Koebner, *Empire* (Cambridge: University Press, 1961) for a discussion of the meaning and the development of the word "empire." Lindley, *Acquisition* . . . , discusses "protectorates" at pp. 182ff. and "spheres of influence" at pp. 208ff.

Indeed, the sphere tended to be the first step towards the establishment of a protectorate. The latter, by contrast, did not arise through international agreement among the European powers. It was an arrangement made between a native chief or leader and a Western country which was offering some degree (usually unspecified) of "protection" to the former. In fact such protection almost invariably led to interference and some degree of control by the Western power.

The problem of conflicts between legal theory and political expediency was bound to arise in the case of protectorates and spheres of influence. Both concepts had a marked legal background. They depended upon treaties and consequently problems of interpretation were bound to arise. Furthermore, their meaning developed as a creation of international lawyers. So, it was difficult for a decision-maker, no matter how pragmatic or disinclined to theory he might be, to disregard the theoretical framework within which the meaning of these words developed. At the same time—and this is not surprising—the legal theory that did develop was fashioned by practical needs. In that sense there could be a harmony between theory and practice; but frequently there was more disharmony than harmony, and chiefly because legal considerations did not keep abreast of practical requirements.

Questions of jurisdiction, chiefly concerned with the competence of British authorities or the operation of British legislation in territories beyond the dominions of the crown, involved many points of specific law, both international and constitutional. Not surprisingly the policy-makers in Whitehall felt themselves unable to answer these questions on their own ability and found it necessary to have constant recourse to their legal advisers as to how British jurisdiction might be exercised. But the advisers often proved unhelpful. In early references the law officers and other legal advisers responded in a very pliant manner; sometimes, indeed, they were too amenable. They were inclined to follow the direction of policy indicated by the Colonial or Foreign Offices at a time when a more positive legal direction would have been both desirable and useful.



Two reasons can be suggested for this pliability in mid-century questions of extritorial jurisdiction. Firstly, the law on this matter was not highly developed. Only a few elementary principles existed and intricacies had not been looked into, especially insofar as uncivilized areas in Africa and the Pacific were concerned. In fact, the lawyers were undecided and confused, especially in Pacific cases, as to whether sovereignty existed in a society far removed from the trappings of civilized life as known in Europe. The laws on extritorial jurisdiction had undergone development for states not Western and not Christian but with a recognizable civilization of their own, such as in Turkey or China. In these cases agreements or capitulations between the European power and the foreign state would be obtained whereby the European nationals were taken out of the jurisdiction of the foreign state and put under the jurisdiction of their own consul exercising judicial and other such powers so that European law might operate in respect of their person and their property. So, for example, in the case of Turkey British subjects and British protected persons (a term which will be defined later) came within the scope of British extritorial privileges; British jurisdiction was exercised in respect of all crimes committed by them and a number of civil proceedings. In some civil cases mixed courts (of British and Turkish officials) were created but the intention was always to afford as much British protection as possible to a British subject in these foreign countries with different standards of civilization. To arrange these extritorial privileges it was obviously essential that there exist an established government, some kind of a sovereign power, with whom British authorities could negotiate and make arrangements and treaties. The fulfilment of this condition in parts of Africa and the Pacific was a dubious proposition. Although aware of these gaps and deficiencies in the law the mid-century lawyers were not prepared to differentiate the African and Pacific situations from the usual kind of extritorial jurisdiction that operated in Turkey or China; nor, for that matter, did anyone suggest that they should aim to make such a differentiation.

The second reason for the lawyers' pliability was a factor

arising from this indefiniteness of the law. The Colonial Office and the Foreign Office generally treated jurisdictional problems as matters of policy. When necessary they were prepared to introduce legislation to provide a legal basis for the policy decided upon. Under those circumstances it was unnecessary for the legal advisers to search for legal complications in the existing law; it was easier to allow an omnipotent legislature to settle the issue for future occasions. The lawyers would advise on the suitability and sufficiency of the proposed legislation which was designed to stop up a gap in the operation of the existing structure. But they did not feel it incumbent on them as legal advisers to consider an overall theoretical analysis of extraterritorial jurisdiction or to develop this body of law so as to make it more peculiarly applicable to the different situation that African and Pacific expansion was creating.

At the same time it was somewhat short-sighted of legal theorists in Britain not to develop this rather virgin field of law more quickly than they did. Britain's imperial interests were so widespread that from a practical point of view administrators would have benefited from a succinct, efficient definition of extraterritorial powers—how they could be established and exercised. Instead British legal theory made few developments; initially an *ad hoc* solution was devised for each problem that arose. In time this failure to move caught up with the administrators who found themselves restricted by incomplete and inadequate legal concepts on their jurisdictional authority in new areas. Meanwhile, French and German lawyers had been applying their juristic talents in developing more fully the nature of extraterritoriality and in a manner which suited the practical convenience of the administrator, whether he be the policy-maker in the imperial capital or the "man-on-the-spot." Consequently, by the 1880s and early 1890s, the German and French imperial policy-makers, even though in comparison with Britain they had the advantage of neither time involved in imperial ventures nor size of imperial holdings, were able in both theory and practice to extend their influence swiftly and efficiently in the more primitive areas of Africa and the Pacific. By contrast, the British lawyers during



the early 1880s began to devise a hardened system of foreign jurisdiction administration that proved difficult to operate. It was certainly fortuitous so far as British policy-makers and administrators were concerned that this trend did not persist for long. In the early 1890s this approach was abruptly changed, turning almost a full circle, with the lawyers more pliant and their system of law quite open and flexible.

But this is anticipating the development of jurisdictional imperialism. For administrators and lawyers in London in the mid-nineteenth century the problem was both simple and complex. Increasingly British subjects were infiltrating the ignored parts of the world. British policy was hesitant about asserting there a policy of full annexation and sovereignty; at the same time English law was unclear about the exercise of the sovereign power of the British crown and of native chiefs and peoples in the vast, remote, primitive expanses of Africa and the Pacific. Yet if a problem needed special attention, it was easy to have Parliament create a legal answer offering administrators the capability of using British authority.

## Jurisdiction by Legislation

An essential aspect of sovereignty is the assertion that a state has power and control over all its subjects and their property within its territory and also over foreigners and their property when within its territory unless special arrangements otherwise are made.<sup>1</sup> In other words jurisdiction is localized and sovereignty is limited to the territorial confines of the state. On the same principle when a national goes to a foreign country he is normally subject to the control and authority of that country. But another basic principle of international law provides that when a national leaves the territory of his state he is still a national of that state; he is not free from allegiance to it and is consequently bound by any legislation or obligations which the state deems apply to him. So the state's jurisdiction can have extraterritorial application; whether the state can, in fact, enforce its will on its nationals outside its territory is another matter. The rationale for this second principle lies in the duty of the state to protect its nationals whether they be at home or abroad. The state acts as a watchful guardian over the individual when he is outside the limits of the state; it does this to protect not only the rights and interests of the particular individual concerned but also its own national interests. This protective role is most frequently seen in attempts by the home government to find a settlement in trading and shipping disputes in foreign countries.

In theory, if not in practice, jurisdiction in civil matters is wider than that in criminal matters. An English civil court does

1. Hall, *Interpretational Law*, pp. 41-42, 134; Jenkyns, *British Rule*, p. 123; George C. Lewis, *On Foreign Jurisdiction and the Extradition of Criminals* (London: W. Parker & Son, 1859), pp. 3, 8.

not require that a cause of action arise within the dominions of the crown; in practice, however, the court tends to take cognizance of the practical reach of its jurisdiction. In criminal matters jurisdiction is normally bound by the territorial confines of England and Wales. But on occasions English administrators have found it necessary to extend the limits of jurisdiction beyond crimes committed on land in England.<sup>2</sup> The most direct means of doing this was by legislation. One important field of extension dealt with crimes committed at sea; in this respect, the Merchant Shipping Act of 1854 spelt out a most important increase in jurisdiction.<sup>3</sup> Any person of any nationality who was or within the past three months had been a crew-member of a British ship and committed an offence against property or person, ashore or afloat, out of the crown's dominions, fell within the jurisdiction of the Admiralty and could be tried in England. The next year the act was extended making colonial courts competent to try British subjects as above. Our concern, however, is not with maritime jurisdiction which is a full topic in itself but primarily with land jurisdiction.

Here, too, administrators in Whitehall found it necessary to have the ability in certain cases to assert their authority outside the territorial confines of the dominions of the English crown. In 1541 Parliament passed legislation concerning treason and murder even if committed outside the king's dominions;<sup>4</sup> in certain cases the offence could be tried anywhere within the king's dominions. The legislation was designed to facilitate the trial of such crimes and to avoid the inconvenience, expense, and delay of trying such crimes in the place where they were committed. This act was amended and repealed in part on various occasions—1554, 1803, 1828. The principle underlying this early legislation was reflected in the Offences against the Person Act of 1861, a general consolidating statute. One section concerned

2. J. F. Stephen, *A History of the Criminal Law of England* (New York: Franklin, 1964), chap. xvi, reviews the historical background of the territorial limits of criminal jurisdiction.

3. 17 & 18 Vict., c. 104, s. 267; and Amendment 18 & 19 Vict., c. 91, s. 21.

4. 33 Hen. VII, c. 23 (*Statutes of the Realm*); Stephen, *History of Criminal Law*, II, 15; Jenkyns, *British Rule*, 138.

murder or manslaughter committed on land outside the United Kingdom;<sup>5</sup> the victim might be of any nationality but the prisoner had to be a British subject; in such cases the prisoner could be tried and punished in England or Ireland as if the offence had been committed in the United Kingdom. The restriction on courts—in England or Ireland—meant that the prisoner had to be apprehended or be in custody there. Also practical difficulties could easily arise through the need to produce sufficient witnesses and evidence in the United Kingdom. The scope of the statute was broad and permissive, providing a theoretical framework for the exercise of rather wide British jurisdiction over serious crimes committed extr territorially.

The most important legislation of a general nature providing a broad theoretical framework within which imperial planners could exercise some degree of extr territorial jurisdiction was the Foreign Jurisdiction Acts. By the end of the century this legislation had become the main avenue for the exercise of British extr territorial jurisdiction. But at mid-century the acts were not used very extensively in respect to the less civilized areas of Africa and the Pacific. This arose partly as a logical outcome of the original intention and purpose of the legislation. Examples of extr territorial jurisdiction can be traced back to the sixth century B.C. The concept was strengthened by the Romans who, in “colonial areas,” introduced Roman law only for Roman citizens while the former inhabitants remained under their local law.<sup>6</sup>

The need for such extr territorial privileges arose primarily in the case of merchants in a foreign country. And as trading avenues opened up in Europe after the tenth century so the system of extr territorial rights developed and diversified. When a cluster or factory of merchants gathered in a foreign country the regulation of their behavior was usually by consent of the foreign ruler entrusted to a consular official acting in accordance with the precepts of their home law. Cases of such consular jurisdic-

5. 24 & 25 Vict., c. 100, s. 9.

6. For historical background, see the memorandum prepared by James Robert Hope, “Report on British Jurisdiction in Foreign States,” January 18, 1843, F.O. 97/497; also, Charles James Tarring, *British Consular Jurisdiction in the East* (London: Stevens and Haynes, 1887), chap. i; Jenkyns, *British Rule*, pp. 149–50.

tion over British subjects in foreign ports existed during the fifteenth century. In 1404 a royal charter arranged for the settlement of disorders which had arisen among English traders in the Hanse ports.<sup>7</sup> Similar charters applied to the Low Countries and Norway and later they were granted for Italian cities. Trading patterns were ever broadening and in moving eastwards traders encountered the problem of living and operating in countries of a different civilization and religion. When operating in the dominions of the Ottoman Empire European traders felt a greater need than usual to be protected by their own European laws and institutions rather than risk the possible barbarity and partiality of a "heathen" system. The formal regularization of relations between a community of European traders resident in the Ottoman Empire and the Ottoman authorities occurred in the capitulations entered into between France and the Porte in 1535. The English government followed suit in 1579. This method of capitulations became the pattern thereafter when a European power wished to specify formally the manner of the exercise of jurisdiction and authority over its subjects resident or present in a foreign country of a different civilization and religious code.<sup>8</sup> This method was, of course, dependent upon the foreign country consenting to the capitulations. This amounted to an agreement or treaty wherein disputes between nationals of one European country would be determined by their local ambassador or consul; other exemptions and protective measures for Europeans were provided and in return the European authorities were expected to maintain order and control crime among their own nationals.

This system worked reasonably well but in 1826 the British law officers threw doubt upon the powers of fine and imprisonment exercised by consuls under the British capitulations. Also the dissolution in 1825 of the Levant Company weakened the system of extraterritorial jurisdiction exercised there. Legislation of 1826 and 1836 failed to correct defects or to establish a suffi-

7. Hope memorandum, p. 4; George W. Keeton, "Extraterritoriality in International and Comparative Law," *Recueil des Cours*, LXXII (1948, Part 1), 283ff.

8. For background on Turkey, see Nasim Sousa, *The Capitulatory Regime of Turkey* (Baltimore: Johns Hopkins Press, 1933).



cient basis for a valid and effective exercise of jurisdiction there. Consequently, in 1843, James Hope Scott, a parliamentary barrister, prepared a comprehensive piece of legislation designed to set out basic principles for the exercise of foreign jurisdiction in foreign countries like the Ottoman Empire, the Barbary states, and China. When introducing the bill in the House of Lords the Earl of Aberdeen justified the legislation on the grounds that it was necessary to check British lawless activities in the Levant.<sup>9</sup> It had already been carefully considered by the law officers and, although one objection was raised that not enough time had been allowed to consider it, the bill was passed with no disagreement on principle.<sup>10</sup>

Up to this stage grants of extraterritorial rights by non-Christian sovereign powers were put into effect by enabling acts of the British Parliament. The new act of 1843 replaced the former specific acts for individual countries with a framework for a complete system of extraterritorial jurisdiction. It provided that such jurisdiction as Her Majesty acquired in a foreign country was to be held and exercised "in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory." So an Order in Council was sufficient and an act of Parliament was no longer necessary each time the government decided to regulate the use of foreign jurisdiction rights. This procedure obviously pleased administrators in Whitehall. The act did not purport to create or grant jurisdiction; it merely provided for its exercise. The actual jurisdiction and its extent had to be established otherwise, generally by treaty as in the case of the Ottoman capitulations. But it might also be obtained by "grant, usage, sufferance and other lawful means."<sup>11</sup>

The 1843 act was general and enabling—authorizing and legitimizing the use of whatever jurisdiction might be obtained

9. Earl of Aberdeen, August 17, 1843, 3 *Parliamentary Debates* (hereafter *Parl. Deb.*), LXXI (1843), 906; G. E. Metcalfe, *Maclean of the Gold Coast* (London: Oxford University Press, 1962), p. 286 discusses Hope Scott's negotiations with the Colonial Office to sort out problems involved in the preparation of legislation.

10. Foreign Jurisdiction Act, 1843, 6 & 7 Vict., c. 94.

11. During the nineteenth century, extraterritorial jurisdiction was generally established by treaty, Keeton, "Extraterritoriality," p. 327.



in foreign countries. But a British Order in Council was still necessary to specify details of the extent of the power and the manner of its exercise. A number of these orders issued mid-century pursuant to the 1843 act. The first was the Turkish Order in Council of 1844.<sup>12</sup> This, together with further orders of 1847 and 1857, clarified matters such as the use of English law, the court and judicial structure in Constantinople and elsewhere in the Turkish dominions, appeals, the extent of civil and criminal jurisdiction, fines and punishments, bankruptcy, estate and matrimonial jurisdiction, the nature of mixed courts, the power of deportation, and similar matters. The exact provisions in the order depended largely upon the content of the grant of jurisdiction by treaty or otherwise; but most orders followed the same lines. In the 1850s and 1860s similar Orders in Council issued for the following oriental and African countries—Siam, 1856; Morocco, 1857; China, and Japan, 1865; Zanzibar, 1866; Madagascar, 1867; Muscat, 1867. It was suggested in 1871 that a general consolidated Order in Council should be prepared just as the individual Foreign Jurisdiction Acts had been in 1843. Sir Edmund Hornby, a judge with experience of extritorial jurisdiction cases in Constantinople and Shanghai, made the suggestion, the intention being to regulate the jurisdiction of all British courts in extraterritorial places by one Order in Council under one set of rules.<sup>13</sup> The suggestion was vetoed both by the law officers and by the Foreign Office. The former pointed out that such an order would be so general that it would still need to be supplemented by special orders to meet the special circumstances of each country.<sup>14</sup> Hammond, the permanent under-secretary in the Foreign Office, agreed, viewing the proposal as achieving no practical result.<sup>15</sup> Consequently a separate Order in Council was required every time it became necessary to spell out a new grant of foreign jurisdiction.

Apart from this general body of enabling legislation there were

12. For details of all Orders in Council, refer to the relevant volume of Herslet's *Treaties*.

13. Hornby to Granville, August 16, 1871, F.O. 78/2320.

14. Collier, Coleridge, Twiss to Granville, August 30, 1871, F.O. 83/2398.

15. Minute, Hammond, September 24, 1871, F.O. 78/2320.

more specific acts dealing with limited problems of jurisdiction as they arose in various scattered parts of the globe at particular times throughout the century. Generally legislators avoided creating a general system allowing the establishment or operation of wide, jurisdictional powers; they were not concerned to provide in advance for any amount of future jurisdiction that might arise or be needed in a foreign country.

One of the relevant specific acts dealing with extraterritorial jurisdiction was the Murders Abroad Act of 1817 which named the Bay of Honduras and the islands of New Zealand and Otaheiti.<sup>16</sup> The area known in the nineteenth century as British Honduras had originally been part of the Spanish Empire but it was also the venue of adventurers, many of them British. A treaty of 1670 between Spain and Britain acknowledged to a vague extent the latter's interest in the area while the Convention of London of 1786 made a more specific recognition of British interests around Belize (the capital of the area). However nothing so definite as sovereignty could be claimed and so in 1817 the British legislature moved to assert a greater measure of control over certain crimes committed in the area.

A similar vagueness existed with respect to Britain's interest in the islands of New Zealand. Since their discovery by the Dutch in 1642 a number of explorers had made contact with that landfall but no European settlement took place until 1814 when the Reverend Samuel Marsden arrived with missionaries.<sup>17</sup> Even so the British government was reluctant to proclaim sovereignty over the islands and so the 1817 act was designed to act as a stop-gap. It was not until 1840, because of native and land colonization problems and in the face of French interest in the area, that the British arranged in the Treaty of Waitangi for the New Zealand chiefs to cede their lands to the British crown.<sup>18</sup>

16. 57 Geo. III, c. 53.

17. W. H. Oliver, *The Story of New Zealand* (London: Faber and Faber, 1960), p. 42.

18. Treaty, in Hobson to Governor Gipps, February 5, 1840, "Correspondence Relative to New Zealand," H. of C. No. 311, p. 8, *P.P. 1841*, XVII; Oliver, *Story of New Zealand*, pp. 48-49; A. Ross, *New Zealand Aspirations in the Pacific in the Nineteenth Century* (Oxford: Clarendon Press, 1964), p. 13.

Otaheiti (later called Tahiti) became a center of British missionary activity after 1796. A few British settlers followed but British penetration was not great although after the defeat of the French in 1815 it seemed possible the whole South Pacific would become an area of British influence.<sup>19</sup> A request for British protection in Otaheiti was made but it was not taken up. The 1817 act was meant to afford sufficient British control over the few British subjects there; but the French began to reassert an interest and in 1843 took Tahiti under their protection.

The 1817 legislation was designed to bring some British jurisdiction to these specified remote and sparsely settled areas. A fourth general territorial category was added in the act, making it applicable to other islands, countries and places neither within the dominions of the British crown nor within the control of any European power. The people liable to the jurisdiction were the master or crew of a British ship, or people who had deserted from such ship and continued to reside in the area. Some British connection was necessary but it was not restricted to purely British subjects. However two significant limitations were imposed on the exercise of this foreign jurisdiction. Firstly the type of crime triable was limited to murder and manslaughter. Secondly the venue of trial was not the scene of the crime but one of the colonial courts. Here the obvious problem arose that although the trial would go to the nearest competent court it might still be too far from the scene of the crime to allow the trial to be arranged effectively.

The act was revised in 1873 by removing the three named areas, since other judicial arrangements had been made there by that time; but it left intact the general phrase covering places not under British or European dominion, in other words, the remote, unclaimed areas of the world.<sup>20</sup> However, because of the practical difficulties in implementing the legislation it is difficult to assess how frequently or successfully it was used. In 1859 Sir George Cornewall Lewis, a prominent English jurist and politi-

19. Ross, *New Zealand*, pp. 9-12; Guy H. Scholefield, *The Pacific, Its Past and Future* (London: J. Murray, 1920), pp. 9-10.

20. Statute Law Revision Act, 1873, 36 & 37 Vict., c. 91.

cian, wrote in his treatise, *On Foreign Jurisdiction*, that the act was probably obsolete;<sup>21</sup> indeed, he doubted that it had ever been put into operation. But cases of its use do exist and in 1878 the law officers commented on usage. Their intervention arose in a case concerning atrocities committed on Africans in the Congo region. Whites of various nationalities—English, Dutch, Spanish—had drowned over thirty Africans whom they held as slaves.<sup>22</sup> Both the drowning and the slave-holding attracted the attention of the English press and public.<sup>23</sup> The Foreign Office found itself caught by a seeming lack of jurisdiction whereby a particular Englishman involved could escape trial and punishment. Pauncefote greatly “regretted that no practical means existed of bringing the Englishman to trial.”<sup>24</sup> At first the law officers, following the lead of the Foreign Office, could find no practicable means of asserting jurisdiction over the man.<sup>25</sup> This instance of shallow, superficial research and advice by the law officers was not atypical; rather it was a good example of the operation of the system where the law officers relied upon the instructing department to refer them to the relevant statutes, regulations, and legal authorities from which a report could be made. The law officers themselves did not usually seek out the relevant law that might supply the answer to the case at hand.

Some eight months later, however, the matter was rectified. Another case had come before the law officers concerning the execution of an American sailor by a British subject at Samoa, which was independent at the time. This was one of the infrequent occasions when the law officers, of their own accord, looked for the law beyond their instructions from the originating department. Although the Foreign Office made no reference to it the law officers relied upon the 1817 act as affording jurisdiction in the islands of Samoa.<sup>26</sup> Pauncefote, legal assistant under-secretary in the Foreign Office, could not fully accept the

21. Lewis, *On Foreign Jurisdiction*, p. 26.

22. Memorandum, Pauncefote, May 16, 1877, Derby to Holker, Giffard, Deane, July 28, 1877, F.O. 97/489.

23. Forster, August 9, 1877, 3 *Parl. Deb.*, CCXXXVI (1877), 678.

24. Pauncefote to Hopkins, August 31, 1877, F.O. 97/489.

25. Holker, Giffard, Deane to Derby, August 9, 1877, F.O. 97/489.

26. Holker, Giffard, Deane to Derby, March 27, 1878, F.O. 58/161.



report since he felt convinced that the legislation was no longer operative.<sup>27</sup> Accordingly, another reference was made to the law officers mainly to check whether they stood by their opinion, and they did.<sup>28</sup> Pauncefote was willing to accept this affirmation and then reasoned that the legislation could be applied equally to the Congo as to Samoa.

Another example of the special legislation that was created by London authorities for the exercise of British jurisdiction in foreign areas was the Cape of Good Hope Punishment Act passed in 1836. The northern boundaries of the Cape colony had been set at the Orange River but in reality these artificial borders set on paper could not confine the spread of settlement. In particular Boer farmers wanted to remove themselves beyond the reach of British justice and jurisdiction.<sup>29</sup> Some of these *Voortrekkers* moved eastwards from the Cape colony into Zulu territory; others entered the Natal area but the most significant body caravanned beyond the Orange River northwards into areas far away from any form of British influence or control. British authorities were unwilling to annex more territory in southern Africa but at the same time authorities in London were concerned to make some show of protection for native peoples from depredations by whites such as the Boer infiltrators. Already the Colonial Office was troubled by acts of plunder and outrage between Kaffir peoples in the eastern districts of South Africa and over British wanderers generally.<sup>30</sup> The 1836 act was designed to provide some form of control over the Boer emigrants.<sup>31</sup> It followed Indian precedents relating to the authority of the East India Company in foreign areas. It took, as an arbitrary limit to British jurisdiction, all territories south of the twenty-fifth degree of south latitude and provided that all British subjects

27. Minute, Pauncefote, *ca.* March 30, 1878, F.O. 58/161; for Pauncefote's biography, see Appendix.

28. Holker, Giffard, Deane to Salisbury, May 10, 1878, F.O. 58/161.

29. Monica Wilson and Leonard Thompson, *The Oxford History of South Africa* (Oxford: Clarendon Press, 1969), I, 370.

30. Glenelg to D'Urban, December 26, 1835, "Despatches from and to the Governor of the Cape of Good Hope Relative to the Caffre War," H. of C. No. 279, pp. 68-70, 73, *P.P.* 1836, XXXIX.

31. 6 & 7 Wm. IV, c. 57.



who committed crimes in that area were subject to the laws in force in the Cape colony and accordingly were punishable in the Cape courts. It should be noted that the act applied to British subjects but, in the view of officials in London, this included the Boer *émigrés*.

The act failed in its objective of extending effective British jurisdiction beyond the confines of its colonial possessions. The reasons are practical. The act was mainly a piece of paper because funds were not provided to implement its intention; consequently only a minimal staff could be made available to attempt its enforcement.<sup>32</sup> The very necessity of using Cape courts was in itself a debilitating factor; but, apart from the lack of executive power, the *Voortrekkers* themselves kept moving northwards even beyond the twenty-fifth degree of south latitude and so even theoretically beyond any degree of British control. Indeed the act appeared cast very much in the frame of a noble gesture without sufficient conviction as to its efficacy.

Sir William Molesworth, an ever-persistent critic of an expansionist colonial policy, looked suspiciously at the act and its avowed intent of preserving the peace in South Africa. To him it seemed just another device to extend Britain's southern African empire; the act was the first step of inland expansion; then British authorities would make treaties with the local chiefs; this inevitably led to the appointment of British agents with magisterial authority; the final step was annexation.<sup>33</sup> Confirmation for Molesworth's fears and suspicions can be found in the assertions made in 1849 by the Cape colony attorney-general, William Porter.<sup>34</sup> He was critical of the 1836 act for its lack of practical application but praised it for its intent. "It was more important in its principle than its practical effects." The cause

32. John S. Galbraith, *Reluctant Empire: British Policy on the South African Frontier, 1834-1859* (Berkeley: University of California Press, 1963), pp. 182-83; Wilson and Thompson, *Oxford History*, I, 423, 430.

33. William Molesworth, *Materials for a Speech in Defence of Abandoning the Orange River Territory* (1854), pp. 20-21.

34. William Porter, March 25, 1849, in Smith to Grey, March 26, 1849, C.O. 48/205/4350; Cornelius W. De Kiewiet, *British Colonial Policy and the South African Republics, 1848-1872* (published for the Royal Empire Society; London: Longmans, Green and Co., 1922), p. 12.

for his praise was his belief that the legislation laid the foundation for the establishment of sovereignty in areas adjacent to the Cape colony. Within its limits, the act acknowledged the principle that Britain was responsible for the conduct of its subjects towards the helpless native races among whom they were settling. It offered a cheap means of control by act of Parliament; but if it did not work further steps could be taken—armed interference for the occasional emergency, or perhaps a permanent resident who would acknowledge the continuing supremacy of the chiefs, or, in the last resort, full British sovereignty over the area. The attorney-general's statements amounted to an expression of expansionist desires by a colonial government but nevertheless provided sound insights into the problems facing British policy in the more remote and uncivilized areas of the globe. Legislation was a cheap answer but money was needed if the legislation was to have any serious effect. But the commitment to legislation was often the prelude to a commitment of greater significance; irrespective of official wishes, it could be the first step towards annexation. Once a deliberate step had been made towards protecting British subjects in these regions it was hard to back-peddle and remove the British umbrella.

Partly because of the ineffectiveness of the 1836 act further legislation was obtained in 1863 with the intention of clarifying and improving the exercise of jurisdiction in the region.<sup>35</sup> In the 1840s and early 1850s the British government was in a quandary on the attitude it should take towards the Orange Free State and the Transvaal. The Boer settlers, who had been the focus of attention in the 1836 act, repeatedly made demonstrations of their independence of British control. Finally the British government assured the independent existence of the two republics. These areas now had to be removed from the scope of the 1836 act since its intention was to provide jurisdiction in areas where no civilized government exercised authority. But further problems of administration had arisen with the establishment of

35. Offences (South Africa) Act, 26 & 27 Vict., c. 35.

Natal as a separate colony in 1856. In 1862, the lieutenant governor and the chief justice of Natal complained of their inability to control British traders and hunters, being subjects of Natal, when they were beyond the limits of the colony.<sup>36</sup> In those cases, they were free to perpetrate all manner of crimes against natives with little fear of legal reprisal. The Natal authorities requested that Natal courts be granted jurisdiction similar to that of the Cape courts. There was also a need to streamline and facilitate the apprehension and trial of offenders.

The Colonial Office approved the requests, as did the law officers.<sup>37</sup> A bill was prepared to improve the provisions of the 1836 legislation. It was now expressly provided that the courts of Natal, along with those of the Cape colony, would have jurisdiction in respect of crimes committed by British subjects in any area south of 25 degrees of south latitude which were not within the jurisdiction of any civilized government. The legislation made it quite clear that Britain was not making claim to any title or sovereignty in the area. This was still a case of the exercise of jurisdiction on a cheap budget. Not surprisingly, the bill passed both houses of Parliament with minimal discussion.<sup>38</sup>

The Cape Act provided a model for similar jurisdictional problems in Sierra Leone. Continuing native wars and continual interference by British subjects in distant inland areas called for the establishment of some kind of British jurisdiction in areas adjacent to the coastal colony. In 1849 the acting governor requested a three hundred mile extension.<sup>39</sup> British residents in the colony urged annexation of neighboring countries to enforce order.<sup>40</sup> The Colonial Office in 1861 responded with legislation extending British authority over British subjects in adjacent territories—north to the Rio Grande, south to the river Gallinas,

36. Scott to Newcastle, enclosing report of chief justice, August 25, 1862, C.O. 179/65/10726.

37. Minutes, Rogers, November 4, 1862, Fortescue, November 6, 1862, C.O. 179/65/10726; memorandum on draft bill, Barrow, April 8, 1863, Atherton, Palmer to Newcastle, April 4, 1863, C.O. 179/69/3307.

38. 3 *Parl. Deb.*, CLXX (1863), 1922, CLXXI (1863), 240, 474-75.

39. Pine to Grey, October 23, 1849, C.O. 267/208.

40. Christopher Fyfe, *A History of Sierra Leone* (London: Oxford University Press, 1962), p. 299.

and five hundred miles inland from the colonial border.<sup>41</sup> It did not extend to natives unless they were already British subjects and it specifically provided that British sovereignty was not being established there. Neither house of Parliament showed much interest in the bill. To most members it was another piece of legislation to combat slavery, which was partly true, but none saw it in the light of a jurisdictional device providing for greater British control in an area outside the British dominions.<sup>42</sup>

A further attempt by the British government to create a structure providing sufficient jurisdiction to British authorities over unclaimed, uncivilized areas in Africa can be seen in the creation of a new post, that of high commissioner. Sir Henry Pottinger, with wide experience in Indian administrative problems, was sent to the Cape colony in 1846 to sort out recurrent troubles on its frontiers. Yet another Kaffir war had broken out that year, this time over a misunderstanding between the natives and the British authorities about the operation of the British system of justice and administration. Causes of the earlier wars lay in a similar confusion and misunderstanding but more importantly could be attributed to resentment by the natives at intrusion upon their land and the disturbance of their cattle by emigrant Boers and other whites. It was the desire to pacify and regularize relations between the Kaffirs and the whites rather than to control the Boers that prompted the issue of the commission. At Pottinger's request he was appointed not only governor of the Cape colony but also high commissioner for South Africa. In the latter function he was to settle and adjust the affairs of the territories in southern Africa adjacent or contiguous to the Cape.<sup>43</sup> He was instructed to take measures "for preventing the recurrence of any irruption" into the colony by nearby tribes, "for maintaining our said colony in peace and safety from such invaders," and "for promoting as far as may be possible the good order, civilization, and moral and religious instruction of the tribes aforesaid,

41. Sierra Leone Offences Act, 1861, 24 & 25 Vict., c. 31.

42. See Brougham, May 11, 1861, 3 *Parl. Deb.*, CLXII (1861), 2192.

43. Commission to Sir Henry Pottinger, October 10, 1846, "Correspondence Relative to the State of the Kaffir Tribes," [912], p. 5, *P.P.* 1847-48, XLIII; Galbraith, *Reluctant Empire*, pp. 217-19.



and with that view for placing them under some settled form of government." The British government did not intend to annex British Kaffraria, an area with no definite boundaries to the east of the Cape colony, although it was intended that the eastern boundary of the colony should be fixed. This was set at the Keiskama River. With respect to the Kaffir areas east of this line, Pottinger was instructed to secure from the chiefs and tribes an acknowledgement that the queen was the "protector of their nation."<sup>44</sup> No explanation was made of the concept "protector." Pottinger was not in Africa long enough to implement any of these instructions but his successor, Sir Harry Smith, chose not to worry about the restrictions on annexation and indulged in a bout of imperial expansion, in both Kaffir and Boer lands.

The concept of high commissioner began badly under Pottinger and Smith, and in following years further problems arose involving the operation of the powers of the high commissioner. Confusion and disagreement about the extent of his powers soon arose because the commission and written instructions were vague in scope. Since the boundaries of the colony itself were not clearly established it was not surprising that the limits of extritorial jurisdiction were deliberately left inexact. And, under such circumstances, one might well excuse the man-on-the-spot for putting a wrong interpretation on his powers. But it was difficult for the administrators in London to know whether the misinterpretation was deliberate or honest; in 1863, the Colonial Office made a more definite pronouncement about the general powers, including extritorial jurisdiction, of the high commissioner.

The occasion was prompted by the very definite assertion of the then high commissioner and governor of Cape colony, Sir Philip Wodehouse, that there were no limitations on his authority as high commissioner when acting in South Africa.<sup>45</sup> No geographical limits were set upon the term "South Africa" other than it excluded the territory of the Cape colony itself (and presum-

44. Grey to Pottinger, November 2, 1846, "Correspondence . . .," [912], pp. 3-4, *P.P.* 1847-48, XLIII.

45. Wodehouse to Newcastle, February 18, 1863, C.O. 48/417/3021.



ably territory under any civilized government). In making this assertion Wodehouse was relying upon the very wide terms of the commission quoted above; he also drew upon his experiences as superintendent of British Honduras. There it had been his duty to take charge of the interests of British subjects. Wodehouse interpreted this duty as unlimited and the Colonial Office had offered no objection to his interpretation. In the present case, he was acting in his capacity as high commissioner for the Transkei territories (northeast of British Kaffraria, between the Kei and Bashee rivers); he had appointed a magistrate there to try petty offences and made other administrative arrangements for the area.<sup>46</sup> A legal technicality had arisen about the status of the Transkei territories, the effect of which was to impugn the validity of Wodehouse's actions there. It was in reply to these legal quibbles that Wodehouse announced "I see no limit to my authority as High Commissioner." He saw himself as an independent authority bound only by the spirit of his commission, by his allegiance, and by his responsibility to the British government for exercising the power in a manner calculated to win their approval.

The Colonial Office balked at this sweeping claim. Sir Frederick Rogers, permanent under-secretary to the Colonial Office, led the attack.<sup>47</sup> He argued from a lawyer's point of view that the commission purported to confer a mere title. In times of peace it conveyed such moral influence in dealing with foreign tribes as the individual so commissioned was personally capable of creating.<sup>48</sup> In times of war he was limited in regard to the commencement of hostilities and the prescription of their object by the amount of effectual power that he actually possessed. Rogers went on to rationalize that if it had been intended that the high commissioner had legal jurisdiction or power this could have been conferred by Order in Council under the Foreign Jurisdiction Act. Accordingly it seemed that Wodehouse had

46. Newcastle to Atherton, Palmer, November 29, 1862, C.O. 48/414/10592.

47. Rogers, see Appendix.

48. Minute, Rogers to Eliot, n.d. (*ca.* April 1, 1863), C.O. 48/417/3021; Rogers admitted that he was taking a lawyer's view of the matter, which might involve serious practical difficulties.

gone beyond his powers in granting land, and appointing magistrates with power to try and imprison criminals beyond the limits of the British dominions. Rogers was not prepared to consider a future extension of the high commissioner's powers in areas beyond British subjection. The colonial secretary, the Duke of Newcastle, agreed: <sup>49</sup> "I see no good in enlarging them [the high commissioner's powers] to meet his estimate of what they are."

The problem had arisen through the lack of definition of the commissioner's powers. In 1862 the Colonial Office simply informed the law officers that "the Governor of the Cape also exercises a certain undefined authority in South Africa beyond the limits of British territory as Her Majesty's High Commissioner" and gave no further explanation of the post.<sup>50</sup> The law officers merely observed in reply that "the powers of the High Commissioner are extra-territorial; and do not relate to acts done within any part of the present territory of the British Crown."<sup>51</sup> In 1863, in the light of Wodehouse's assertions, the Colonial Office decided upon a more definite reference to the law officers in the hope of defining more fully the powers of the high commissioner and how they could be exercised.

The law officers came down on the side of the Colonial Office as to limitations on the high commissioner's powers.<sup>52</sup> Firstly, they believed that not even the queen herself possessed such power and jurisdiction as the high commissioner supposed himself to possess. Secondly, the commission did not confer on him the very expansive authority that he had exercised; certainly he did not have the power to found and enforce legal jurisdiction beyond the limits of British territory. Well pleased with this advice the Colonial Office accordingly sent instructions to Wodehouse to exercise his authority as high commissioner with the greatest caution.<sup>53</sup> But one should notice that still no attempt was made to spell out clearly and definitely the extent of exter-

49. Minute, Newcastle, April 29, 1863, C.O. 48/417/3021.

50. Newcastle to Atherton, Palmer, November 29, 1862, C.O. 48/414/10592.

51. Atherton, Palmer to Newcastle, December 24, 1862, C.O. 48/415/12337.

52. Atherton, Palmer to Newcastle, June 18, 1862, C.O. 48/420/6072.

53. Newcastle to Wodehouse, July 6, 1863, C.O. 48/420/6072.

ritorial power that the high commissioner could validly exercise.

One consistent factor underlying British policy mid-century was the desire on the part of Whitehall to avoid involvement in African affairs beyond the boundaries of its colonial establishments and even within these the hope was to keep British participation at a minimal level. The one exception was in the sense of moral duty shared by many prominent British figures that the slave trade throughout Africa must be controlled as much as possible. This duty apart, administrators in London wanted particularly to avoid the assumption of responsibility for native matters and for the provision of a developed system of government and administration in areas beyond its defined colonial bounds even though they might be frontier areas and likely trouble-spots. Although they had already shown themselves willing to allow an extension of regular judicial facilities to deal with British subjects beyond established territorial limits, they were not prepared to undertake wider responsibility in matters of jurisdiction or general administration and government. Consequently, if legal objections could be found, the British government was more than pleased to take advantage of these reasons for limiting the extent of British authority.

This lack of interest in the more remote and sparsely settled areas was not because of a lack of authority to create the necessary governmental machinery to regulate such areas. So long as the British government was prepared to establish its sovereignty over those lands, a means of creating a basic, skeletal government system was already provided in the Coast of Africa and Falkland Islands Act of 1843.<sup>54</sup> This act was confined to the areas mentioned in the title but an amending act of 1860 extended its provisions over the whole globe.<sup>55</sup> The aim of the acts was to create a semblance of regular British administration and government including the provision of sufficient juridical control over British subjects while making allowance for the sparseness of white settlers and the great distances involved. In effect, wherever British subjects made settlements (meaning that British

54. 6 & 7 Vict., c. 13.

55. 23 & 24 Vict., c. 121.

sovereignty had been asserted) on the coast of Africa or the Falkland Islands, or settled other places which were British possessions but had no officially established government, a system of government and administration might be provided for them by Her Majesty's Order in Council. Furthermore, these powers might be delegated to three or more residents of the settlement. So British administrators in London did not need to obtain parliamentary approval for their plans to establish laws, institutions, courts, or to make regulations for the administration of justice and the maintenance of peace, order, and good government for all people within the settlements. The further power to allow local residents to exercise these powers meant that Whitehall need not be cluttered up with the control of a host of trivial details for such small colonial responsibilities. In the delegation of power it was implicitly acknowledged that the local residents, through their fewness in number, would probably carry out their functions with only rudimentary institutions.

The 1843 act arose partly out of the report the previous year of a select committee of the House of Commons on West Africa.<sup>56</sup> The committee was inquiring generally into the government and administration of the various British forts and trading settlements scattered along the west coast of Africa and in particular into problems of administration and slavery along the Gold Coast where Captain Maclean was in charge. It recommended that the merchants' government established for the Gold Coast settlements in 1828 be scrapped and that the area come again under the direct control of the crown. Bearing in mind the small population there, Stephen of the Colonial Office and Hope Scott, a legal draftsman, considered that it would be foolish and impractical to treat the area as a regular colony acquired by the settlement of British subjects; instead it was decided that the Gold Coast settlements should be treated as a conquered colony.<sup>57</sup> The significance of this decision was that the crown had absolute power of legislation by Order in Council which it did not have

56. "Report," H. of C. No. 551, pp. iv-v, *P.P.* 1842, XI.

57. Minutes on West African Settlements, Stephen, December 26, 1842, Hope, January 30, 1843, C.O. 96/2.



in the case of a settled colony. Consequently, the British government did not have to worry about the early establishment of a representative legislative assembly for the area. The 1843 act gave the crown the power to legislate for the area as in the case of conquered colonies.<sup>58</sup> When the bill was introduced into the House of Commons no discussion took place on the principle of the legislation although, as normally happened, comments were made about the cost of colonial enterprises.<sup>59</sup>

The amending legislation of 1860 arose out of administrative problems for the Keeling or Cocos Islands, which had been acquired in 1825 and since 1857 been under Admiralty control. The need arose to establish some kind of legal authority and some mode of trying offences.<sup>60</sup> Geographically the islands were outside the limits of the 1843 act. So Rogers proposed an extension of the legislation to all possessions of the queen established by occupation and not having any officially authorized government.<sup>61</sup>

A precondition to the operation of these two acts was that the areas had to have been originally settled by British subjects and not obtained otherwise—by conquest or cession. The land was held to be part of the British dominions and the purport of these acts was merely to simplify administrative arrangements. All the trappings of a colonial government could be avoided in places where the British population was too small to warrant the creation of a regular administration. In 1887, these two acts were reenacted, with a slight modification, in the British Settlements Act.<sup>62</sup> These three acts, however, were not used very much because of the government's normal disinclination to establish or acknowledge British dominion over areas of sparse settlement.

A comparison should be made between the effectiveness of the Foreign Jurisdiction Act of 1843 and its later amendments on the one hand and the other classes of extraterritorial legislation on the

58. As a result of this act and the Foreign Jurisdiction Act of 1843, an appropriate Order in Council concerning jurisdiction in the Gold Coast was issued in 1844, see within.

59. Hume, March 21, 1843, 3 *Parl. Deb.*, LXVII (1843), 1143.

60. Newcastle to Bethell, Atherton, May 18, 1860, C.O. 885/10.

61. See Granville, July 30, 1860, 3 *Parl. Deb.*, CLX (1860), 342.

62. 50 & 51 Vict., c. 54.



other. The latter group comprised a wide range of various kinds of jurisdiction: the general criminal provision of 1861; the 1817 act concerning murders abroad, with its 1873 revision; the 1836 act applying specifically to the Cape frontiers, and later similar acts for Natal and Sierra Leone, along with the device of a specific post, the high commissioner, with duties concerning frontier-jurisdiction problems in South Africa. Although dealing with an elementary legislative system in small British settlements and not with problems of extraterritorial jurisdiction as such, one might add the acts of 1843 and 1860 providing for the west coast of Africa and the Falkland Islands. These acts provided a British approach to the problems of disorder around the globe. But on the whole they proved to be deficient and rather ineffective. It must be borne in mind, however, that mid-century administrators in Britain and in the colonies realized that this legislation provided only a very elementary and fragmentary system of jurisdiction and justice. The areas to be covered were large, the number of British subjects few, and the technical difficulties in the apprehension of criminals and the production of witnesses to an appropriate court, either local, colonial or in Britain were formidable. The legislation was enabling but it was still designed mainly as a stop-gap. In any case, in the presence of a mid-century reluctance to undertake wide-ranging imperial responsibilities the hesitancy of these legislative steps was hardly surprising. Although the virtues of establishing a system of law and order in uncivilized areas were acknowledged British policy-makers did not actively pursue this legalistic motive. The need to provide some small amount of British justice for British subjects in those areas demanded a response by Whitehall but the response, although not negative, was very limited and grudging.

The Foreign Jurisdiction Act was the most useful of the five main legislative devices for the exercise of British foreign jurisdiction across the world. Although that act needed to be implemented by specific orders for specific areas it also did provide a general framework for the operation of foreign jurisdiction. The other legislative devices were more limited, being restricted to specific problems and disorders or specific areas. Overall the

former piece of legislation functioned most usefully as a device to enable a certain degree of British influence and control in areas under foreign sovereign authorities; the more specific acts, when they were used, were more operative in cases where it was difficult to find any sovereign authority at all. But neither mid-century lawyers nor policy-makers nor administrators thought of making such a distinction in types of foreign jurisdiction areas.



*British "Influence" Mid-Century*





## Ad Hoc Arrangements for West Africa

The similarity in formal appearance of the individual orders for countries in the Orient and North Africa was pinned on the fact that in each of those countries a somewhat recognizable and well-established government could be discerned; although their way of life, their religion, their civilization might be different from the European system and might not share the same intellectual heritage there existed, nevertheless, a form of society, government, and civilization sufficiently organized to gain some measure of respect from the European nations. The Foreign Jurisdiction Act of 1843 provided a workable basis to arrange relations between the two kinds of society. But when the act was used in West Africa problems of adaptation arose. The area was a disparate collection of political units, ranging from kingdoms to petty chieftaincies and local tribes.<sup>1</sup> Some of the societies were large in size and population, with well-organized political and military machines. Other groups were small and weak, at the mercy of stronger neighbors. The latter group were more frequently spread along the West African coast and it was with these littoral groups that British traders and adventurers made first contact. This area, in fact, provided a testing ground for the operation of the Foreign Jurisdiction Act for places which were not only non-Christian but also primitive, without a highly developed civilization and culture by current European standards.

Official British interest in West Africa centered chiefly on the slave trade carried on by sea, along the coastal reaches, and

1. For a review of the large kingdoms see Daryll Forde and P. M. Karberry, eds., *West African Kingdoms in the Nineteenth Century* (Oxford: Oxford University Press, 1967).

even inland. The West Africa squadron was stationed off the coast for this purpose. Through a series of diplomatic arrangements with European countries the British government hoped to make fully effective its suppression operations against all carriers. But the squadron had only a limited success and it was obvious that control from the sea alone would not be sufficient. From the British forts and settlements on the Gold Coast at least a moral pressure could be brought to bear on nearby chiefs to limit the degree of the trade. These forts which themselves had earlier been centers of slave-shipping were faltering trading posts by the beginning of the nineteenth century.<sup>2</sup> By 1820 the number of forts was reduced to four. There already existed a great deal of uncertainty about the relations between the forts and nearby native tribes. It was an open question as to the kind of jurisdiction that Britain could legally exercise in the nearby areas and it was not until 1844 that an attempt was made to regularize the situation.

In the early nineteenth century, through trading, missionary, and government channels, a system of "allegiance" was slowly building up. It arose largely from the native desire for British assistance and protection against the strong and warlike Ashanti state. George Maclean, who in 1829 took over control of the administration of the Gold Coast forts and settlements on behalf of the London Committee of Merchants, increased the area of British influence through treaties and military expeditions. Of more importance were his efforts to increase quickly the use of rudimentary British justice among the natives. Justices of the peace moved regularly around the country offering judicial facilities to Africans as well as to the few British settlers.<sup>3</sup> A select committee appointed in 1842 to inquire into West African problems approved Maclean's work in establishing "a very wholesome influence over a coast not much less than 150 miles in extent, and to a considerable distance inland."<sup>4</sup> There he had suppressed slave trading, maintained peace and security, and exercised "a

2. Metcalfe, *Maclean*, p. 36.

3. *Ibid.*, 170-71, 177.

4. "Report of Select Committee on the West Coast of Africa," H. of C. No. 551, p. iv, *P.P.* 1842, XI.

useful though irregular jurisdiction, among neighbouring tribes."

This area where Maclean spread British jurisdiction and justice was subsequently labelled a "protectorate" although the term was not defined. Certainly in Maclean's own time no definition was made in respect of the extent or kind of authority that Maclean exercised over neighboring native tribes. It was not legally established; it was not clearly based upon treaty grants. Rather it had grown out of personal relationships, out of a respect held by the natives for Maclean's fairness and wisdom. Certainly it was not forced upon the native leaders but was willingly accepted by them. No attempt was made to assert British sovereignty outside the established forts-settlements area. As Stanley, the colonial secretary, observed: "As regards any powers to be exercised by Mr. Maclean among Tribes not within British Territory . . . I need scarcely observe that it must rest with the sovereign power in each Territory to authorize or permit the exercise of any jurisdiction within that Territory whether according to British Laws or the Laws there prevalent."<sup>5</sup> The Colonial Office acted on the basis that the native chiefs had full sovereign power in their own territories and so any form of British jurisdiction there had to be acquired by regular means.

Although it referred to problems elsewhere, especially in the Levant, the Foreign Jurisdiction Act of 1843 provided a basis for the regularization of jurisdiction in the Gold Coast. The 1842 committee had recommended that a clearer definition of British jurisdiction and rights vis-à-vis the chiefs beyond the facts should be obtained. "It is desirable that this jurisdiction should be better defined and understood."<sup>6</sup> Captain Hill, who became governor of Cape Coast in 1844, arranged in vague terms a declaration of British jurisdiction. This was encompassed in "the Bond" which was signed in March 1844 by eight Fanti chiefs; later more chiefs signed similar declarations.<sup>7</sup> The documents, not at all the work of a legal mind, simply recited that Britain already exercised

5. Stanley to Hill, December 16, 1843, C.O. 96/2.

6. "Report," H. of C. No. 551, p. v, P.P. 1842, XI.

7. David Kimble, *A Political History of Ghana* (Oxford: Clarendon Press, 1963), p. 194.

power and jurisdiction in territories adjacent to the forts and settlements. The chiefs accepted this. They made assertions of their interest in and respect for the law as the protector of life and property and they outlawed barbarous practices. Furthermore, they agreed that crimes would be tried by British judicial officers, along with the local chief, and that in the trial native custom would be moulded to the general principles of British law.<sup>8</sup> Hill hoped that "the Bonds" would be sufficient to establish conditions wherein the Foreign Jurisdiction Act would operate.<sup>9</sup> Yet they did little to clarify or define the extent and nature of British jurisdiction there; their effect was to reinforce further the existence of a jurisdiction, established by acquiescence, if by no other means.

The Order in Council that issued in September 1844 seemed to ignore "the Bonds."<sup>10</sup> Taking its authority from the Foreign Jurisdiction Act and the Coast of Africa and Falkland Islands Act, both of 1843, the order asserted the existence of British power and jurisdiction in places adjacent to the forts and settlements but did not specify either territorial defines or the extent of the power and jurisdiction. The main purpose of the order was to prescribe the use of English law as much as possible and to appoint the courts at Cape Coast Castle and Sierra Leone as places of trial. It was concerned purely with legal arrangements.

By 1844 it was clear that regardless of earlier legal doubts about British foreign jurisdiction, about its manner of establishment and the extent of its operation, administrators in London had no option but to accept its existence—by consent, or acquiescence, or usage, or usurpation. There was no point in looking further into that question. The next step for them was to make the jurisdiction more exact and regular and this was the intent of the 1844 order. The Foreign Jurisdiction Act was readily accepted as having operation in African states and chieftaincies.

8. Bond, March 6, 1844, "Report from the Select Committee on Africa (Western Coast)," H. of C. No. 412, p. 419, *P.P.* 1865, V.

9. Hill to Stanley, March 6, 1844, private and confidential, C.O. 96/4.

10. Order in Council, September 3, 1844.

The adaptation from Levant and oriental countries with their established governments, religions, and civilizations to a seemingly more primitive society in Africa was made without comment.

Normally the Foreign Jurisdiction Act and orders issued under it applied only to British subjects (or foreigners if they consented to the operation of British jurisdiction). But from the beginning, Maclean had brought British justice to those natives who wanted it, whether they were within the forts, or in areas nearby where some kind of protection was offered by Britain, or in more remote areas where contacts with British administration were of the most insubstantial nature. The 1842 committee restated the law that magistrates were strictly prohibited from exercising jurisdiction over natives and districts outside the forts even if they were under British influence and protection. "All jurisdiction over the Natives beyond that point must, therefore, be considered as optional, and should be made the subject of distinct agreement, as to its nature and limits, with the Native Chiefs. . . ." <sup>11</sup> The 1844 order endorsed the operation of British jurisdiction in the nearby areas but again the principle was voluntary submission by the tribes to the British system.

During the 1850s the extension of actual British jurisdiction, nominally under the foreign jurisdiction legislation though not legally correct, was accelerated. In 1850, Earl Grey, the colonial secretary, commented favorably on the practical results achieved through this flexible use of the Foreign Jurisdiction Act:

. . . under the powers given by the same Act, a jurisdiction has been acquired by H.M. in the Territories adjacent to the Forts on the Gold Coast, and that by this means the neighbouring Chiefs and Tribes have been induced to have recourse to a great extent to British Tribunals for the repression of crime, and to relinquish their own barbarous usages. <sup>12</sup>

Two years later a further step was taken asserting British control over nearby tribes. The chiefs and headmen of the protected towns and districts were called together in a "Legislative As-

11. "Report," H. of C. No. 551, p. vi, *P.P.* 1842, XI.

12. Grey to Macdonald, July 24, 1850, C.O. 268/43.



sembly" with British authorities to discuss financial arrangements for their protection.<sup>13</sup> The native leaders agreed to the levy of a poll tax, the proceeds of which were to be applied partly towards improving the education, judicial, and communications systems in their areas, and generally for the public good.<sup>14</sup> This tax marked a further intrusion of British power into native areas even though no attempt was made to assert British sovereignty there. The British were extending not only judicial but also general administrative powers over nearby areas. This was a more complete form of jurisdiction than that contemplated under the foreign jurisdiction legislation which was, in fact, superfluous except as a backstop if doubts arose about the legality of British action. This extension was possible, however, only because the native leaders agreed to it and could work only with their cooperation. In practice it failed. The poll tax was so unpopular that it led to serious resistance and eventually had to be abandoned. "The Assembly" did not meet again after 1852.<sup>15</sup>

In 1856 judicial arrangements in the Gold Coast were elaborated in another Order in Council which made more specific some of the vague assertions of jurisdiction under the 1844 order.<sup>16</sup> The Supreme Court of the Gold Coast was authorized to hear cases arising in the protected territories without the help of the local chief. This meant a wearing-down of the clause in the Bond where British judicial officers were enjoined to work along with local chiefs. So the areas adjacent to the British forts were increasingly becoming "British" through British jurisdictional authority and the use of English law, without the necessity of establishing British dominion. Through the foreign jurisdiction legislation, and more importantly by the agreement of the chiefs, British authorities were able to exercise control not only over British subjects in these "foreign," protected areas but also over the local inhabitants.<sup>17</sup>

13. Kimble, *A Political History*, p. 172.

14. Local Ordinance (Poll Tax), April 19, 1852, "Acts of Parliament . . . West Coast of Africa," H. of C. No. 383, p. 83, *P.P.* 1854-55, XXXVII.

15. Kimble, *A Political History*, pp. 175-91.

16. *Ibid.*, p. 198.

17. It was not compulsory for the inhabitants to use British courts.

In 1850 and 1853 similar arrangements were made regarding the exercise of foreign jurisdiction in the Sierra Leone area. During the 1840s British subjects from the colony had involved themselves in native wars; also, outrages had been committed by them and been allowed to go unpunished in areas adjacent to the colony. Chiefs asked that these people be punished by British law (or alternatively by native law). But, for lack of British jurisdiction, no effective system of punishment was established. In 1849 the acting governor requested that British jurisdiction be extended as far as practicable—for example, three hundred miles from the colony.<sup>18</sup> The Colonial Office, instead of securing legislation as requested, issued an Order in Council the following year for the regulation of British jurisdiction over British subjects residing in countries adjacent to the colony but under the dominion of native princes.<sup>19</sup> The order provided that the first step for British authorities was to obtain grants of jurisdiction by treaty from "competent chiefs." The latter term was not defined but seemed broad enough to cover any legally or well-established chief or ruler. The order stated distinctly that the Foreign Jurisdiction Act alone was not sufficient to afford the crown any jurisdiction. These direct statements were designed to avoid a repetition of the confusion and uncertainty as to the origins of jurisdiction in Gold Coast areas.

The governor of Sierra Leone proceeded to obtain treaties from chiefs. Then, in 1853, an Order in Council, similar to the 1844 order for the Gold Coast, was issued under the Foreign Jurisdiction Act and the Coast of Africa and Falkland Islands Act of 1843.<sup>20</sup> It recited that jurisdiction had been obtained (mainly by treaty) and provided for as much use as possible of English law in Sierra Leone courts to try offenders brought from adjacent areas.<sup>21</sup>

Although these Orders in Council issued under the Foreign Jurisdiction Act did not directly encourage or advocate expansion, their existence allowed a greater extension of British control to

18. Pine to Grey, October 23, 1849, C.O. 267/208.

19. Order in Council, July 13, 1850.

20. Order in Council, November 25, 1853.

21. Note the 1861 (Sierra Leone) Offences Act.

take place than many administrators in London wanted. Given an expansion-minded governor it was difficult for London to impose effective restraints upon his determination to set the British flag in hitherto unclaimed areas; and given the existence of machinery under the foreign jurisdiction legislation which allowed the exercise of an informal British control in areas not yet claimed it was not a difficult move for such a governor gradually to insinuate the British presence into these areas until it became predominant and overbearing. Blackall, governor of Sierra Leone in 1864, offered typical, sound reasons justifying a policy of expansion.

Judicious extension of Territory may lead to increased powers of self support on the part of the Colony. I believe that by judiciously entering into arrangements for the acquisition of Territory by Treaty, from the Native Chiefs on the Sea board, we should do more to relieve England from the expense of the Squadron for the suppression of the Slave Trade, than by any other means; more particularly if we can obtain establishments at the outlets of the large Rivers. We should also have great control in preventing disturbances in the interior by regulating commerce, and whilst we prevented the export of Slaves, we might, when necessary, prohibit the importation of arms and ammunition.<sup>22</sup>

During the 1850s and early 1860s a number of expansive moves were made by the British along the West African coast. They were usually annexations by cession of small areas, some being made for revenue and trading purposes, some for the control of slave practices. But such policies also attracted criticisms which increased in the mid-1860s. Elliott, assistant under-secretary in the Colonial Office in 1863, condemned "the new acquisitions which we are making on the coast of Africa; low Islands covered with mangrove, surrounded by mud, the channels between them narrow and shallow, little or no cultivation, and only a few miserable villages."<sup>23</sup> The policy that he wanted to adopt involved Britain supplying the centers of civilization, "but commerce should be left to insinuate itself with the suppleness and

22. Blackall to Cardwell, September 21, 1864, C.O. 267/281.

23. Minute, Elliott, March 6, 1863 on Blackall to Newcastle, February 6, 1863, C.O. 267/277.

sagacity which are the best instruments of commerce, and without our undertaking to provide a whole apparatus of Custom Houses and Troops and Lawyers at the mouth of every African River."

Some suggestions were made that Britain should withdraw from the area. This gathered strength when the Ashantis invaded protected areas of the Gold Coast in 1863 and scored significant successes. British prestige among the Africans sagged drastically and this was compounded by the appearance of a weak and vacillating policy on the part of the Colonial Office. A select committee of the House of Commons met in 1865 to consider past and future developments in British policy for West Africa. The members agreed that it was not possible to withdraw the British government completely from the area.<sup>24</sup> But it strongly condemned any new extension of territory or the assumption of government or the conclusion of protection arrangements with natives. The ultimate hope was that responsibility for administration in protected areas could be transferred to the natives. The current protectorate arrangements that existed in the Gold Coast over tribes between the coastal settlements and the kingdom of Ashanti were also criticized. Responsibilities had been assumed by implication (from the Poll Tax Ordinance and similar measures) but had never been spelled out clearly by treaty. As a result Britain had taken upon itself an "indefinite and unintelligible responsibility" that was "uncompensated by any adequate advantage to the tribes."<sup>25</sup> The committee considered that British judicial officials had intruded too much into native affairs and for the future it recommended that the chiefs should be encouraged to use their own jurisdiction as much as possible.

This was a clear statement of future British policy, condemning the extension of extraterritorial jurisdiction as well as outright annexations. Although the committee did not specifically investigate or comment upon the operation of the foreign jurisdic-

24. "Report from the Select Committee on Africa (Western Coast)," H. of C. No. 412, p. iii, P.P. 1865, V; also see W. D. McIntyre, *The Imperial Factor in the Tropics, 1865-75* (London: Macmillan, 1967), pp. 96-100.

25. "Report . . . Africa (Western Coast)," H. of C. No. 412, pp. xi, xiv, xv, P.P. 1865, V.



tion legislation in the area it seemed by implication to condemn the free and expansive interpretation put upon the extent of the legislation that had been adopted mainly for practical reasons in the Gold Coast and Sierra Leone. For the future it seemed that British administrators dealing with areas other than the Gold Coast and Sierra Leone would be expected to adopt a stricter version of powers exercisable in foreign jurisdiction areas and this approach was reflected in the 1872 West Africa Order in Council.

British penetration into the Niger region was later and slower than into the Gold Coast and Sierra Leone areas of the West African coast. Lagos was annexed in 1861 and British influence gradually spread out from that post. The coastal reaches stretching from the Niger delta to the Cameroons was known as the Oil Rivers and in mid-century aroused the interest of British and European traders because it was the source of valuable palm oil. The area was comprised of a number of native states and tribal territories—Benin, Warri, Brass, Bonny, New Calabar, Opobo, Andoni, Ibibios, Ibeno, Old Calabar, Cameroons. The Western traders found themselves beyond the reach of any effective law agencies and committed crimes without fear of punishment. Lawlessness and violence abounded, much of it directed against native peoples.<sup>26</sup> A consul stationed at Fernando Po was virtually powerless to check such outrages because he had neither legal jurisdiction over British subjects nor, in any case, was he supplied with sufficient practical means to make his control and authority effective. Courts of equity had been established but these were irregular tribunals composed of local merchants along with African representatives. Their main task was to settle and arbitrate in trading disputes between British subjects or between British and native dealers but in the absence of any other tribunal these courts frequently handled any kind of dispute.

By 1870 the jurisdictional situation in the Oil Rivers was an unsatisfactory mess from the point of view of London authorities and natives, and, to some extent of British residents in the area.

26. K. O. Dike, *Trade and Politics in the Niger Delta, 1830-1885* (Oxford: Clarendon Press, 1956), pp. 199-201.



That year, Chalmers, the chief magistrate at Cape Coast Castle, held that the courts of equity were not legally constituted.<sup>27</sup> The Foreign Office, wanting to avoid a difficult jurisdictional question, tried to defend the courts on the basis of their provision of a simple and efficient means of administering justice and settling disputes in areas beyond Her Majesty's jurisdiction.<sup>28</sup> But the law officers could not find that the courts were regularly constituted although they agreed that they appeared to be "useful institutions, to the working of which it is undesirable to oppose obstacles."<sup>29</sup> To rectify these legal difficulties the Foreign Office proposed an Order in Council conferring on the consul at Fernando Po magisterial power under the Foreign Jurisdiction Act.<sup>30</sup>

At the same time the Foreign Office was hesitant about the extent of the powers that could be conferred in that manner. Doubts were entertained about the origins of jurisdiction there; indeed it was very difficult to establish that any direct grant had ever been made.<sup>31</sup> But under continuing pressure from the Colonial Office the Foreign Office persisted with legalization of the situation by the issue of an Order in Council following a model prepared in 1871 for Fiji.<sup>32</sup>

The Order in Council applied to the independent states and territories situated on the Old Calabar, Bonny, Cameroons, New Calabar, Brass, Opobo, Nun and Benin rivers. In contrast to the orders for the Gold Coast and Sierra Leone this order was made more precise as to the origins of jurisdiction and the extent of its application. Jurisdiction was stated to have been acquired by sufferance on the part of the natives and it extended to British subjects only. Natives and foreigners could come under British jurisdiction only if they consented to submit to it. "British sub-

27. Chalmers to Granville, June 3, 1870 in Granville to Clarendon, June 11, 1870, C.O. 96/86/6001; Chalmers to Granville, June 23, 1870 in Granville to Clarendon, June 29, 1870, C.O. 96/86/6747.

28. Granville to Collier, Coleridge, Twiss, July 2, 1870, F.O. 83/2362.

29. Collier, Coleridge, Twiss to Granville, July 12, 1870, F.O. 83/2362.

30. Granville to Kimberley, December 21, 1870, C.O. 96/86/13298.

31. Memorandum, Vivian, private, March 27, 1871, C.O. 96/86/13298.

32. Order in Council, February 21, 1872; see also, A. Burns, *History of Nigeria* (5th ed.; London: Allen and Unwin, 1955), p. 140; W. N. M. Geary, *Nigeria under British Rule* (London: Cass, 1965), p. 90.

ject" was defined as all subjects of Her Majesty and also "all persons, natives or others, properly enjoying Her Majesty's protection. . . ." The meaning of natives and others under protection is open to doubt. It has been taken in the wide sense of including all natives in the territories of the chiefs who had entered into some form of agreement for protection with the British.<sup>33</sup> This interpretation does not very aptly apply here. These coastal states and territories were described as being independent and no assertion was made that treaties or protection agreements had been entered into with the chiefs. Since the 1850s, treaties and agreements concerning British trading rights and the limitation of the slave trade had been signed by various native kings and chiefs in the region, but they did not involve the offer of British protection. The 1872 order clearly stated that British jurisdiction in the area was obtained by sufferance and not by any protection treaty. It is difficult to classify the area as a protected one and there is no suggestion in the official correspondence that it was regarded as such. This is in marked contrast to British communications since the 1840s for the Gold Coast and Sierra Leone. In any case the usual legal sense of "persons properly enjoying protection" was quite narrow, being restricted to a person (whether European or native) serving or associated with the British diplomatic or consular establishment. Later, in 1893, it was extended to a person from another protected state but not a person belonging to the actual protected state to which the order applied.<sup>34</sup>

The consul was given full power and authority to carry into effect any treaties made with the chiefs; he could make rules and regulations for the observance of such treaties and for the peace, order, and good government of British subjects there; he had powers of punishment by fine, banishment, or imprisonment over British subjects who breached the treaties or rules and regulations. The courts of equity were to be reorganized and

33. Claire Palley, *The Constitutional History and Law of Southern Rhodesia, 1888-1965* (Oxford: Clarendon Press, 1966), p. 77.

34. Hall, *Foreign Power*, pp. 136-37, 227; memorandum, Gray, June 9, 1893, F.O. 107/11.

put on a more regular basis for the settlement of trading disputes and to help the consul.

The prime concern of the order was to provide means for the control of lawlessness and disorder created by British subjects and it was for this reason that the consul was afforded the power of banishment. A British subject who had been punished twice for any crime and offence and could not find security for future good behavior could be deported. In a similar vein it was provided that the consul could require any British "troublemaker" who upon reasonable evidence was likely to breach the public peace or who had been punished for a breach of the peace to give security to keep the peace or for good behavior and upon the subject failing to produce such security the consul might deport him. Also, a clause was inserted with the hope of checking smuggling and the evasion of customs duties.

This order was closer to those that applied in the more civilized and developed states like Turkey and China than to the West African examples of the Gold Coast and Sierra Leone. In the former powers were more exactly defined and spelled out and, most significantly, it was intended to have a limited application, giving the consul effective power over British subjects only. Two factors helped to explain the difference between the Oil Rivers and the earlier Gold Coast and Sierra Leone examples. First, there was the time factor involving different official approaches. The earlier cases arose from a virtual *fait accompli* of established protection; the later case saw official attitudes protesting against the acceptance of new duties of protection.<sup>35</sup> The second factor arose from the existence in the two earlier cases of coastal colonies and settlements. These were used as bases for the extension of jurisdiction; and, for their safety, it often was necessary to enter into agreements or treaties with nearby chiefs. Out of these arrangements a system of protection evolved. This condition did not apply in the Oil Rivers.

One would expect the Foreign Office rather than the Colonial

35. It is, of course, true that official protests against new annexations and new imperial responsibilities were in some cases belied by the courses of action and policies adopted by the government.

Office to look to the foreign jurisdiction legislation whenever problems of extraterritorial jurisdiction arose. This was because the former controlled the consular service through which the legislation was normally put into effect. The Colonial Office, for its part, could rely upon its colonial officers. But since these officers could not operate legally in non-British areas, special legislation was necessary to entrust them with the legal authority sufficient to solve the problems of lawlessness and injustice that arose in areas adjacent to colonies. So, by the 1870s, when official British attitudes towards the regulation of jurisdiction in native areas of Africa were beginning to become more clarified and rationalized, the Foreign Office not unnaturally exercised its jurisdiction in the Oil Rivers under the Foreign Jurisdiction Act while the Colonial Office sought other approaches—more particularly, special legislation—in respect of new jurisdictional problems near its colonies of Sierra Leone, Gold Coast, the Gambia, and Lagos. It is true that the Orders in Council of the 1840s and 1850s for the first two colonies were issued partly under the authority of the Foreign Jurisdiction Act but this was explicable on the grounds of the doubts about the origins of British jurisdiction there and of the confusion in the minds of British administrators and lawyers about the kind of action they could take. By 1870 the use of the foreign jurisdiction legislation for the Gold Coast was well-established. In any case, authority was also conferred by another statute specially applying to the area, the Coast of Africa and Falkland Islands Act of 1843.

In 1870 the Colonial Office was pressed by further problems of control over relations between Europeans and natives in and near their colonial areas in West Africa. Since 1866 the four colonies, Sierra Leone, Gold Coast, the Gambia, and Lagos had been united under the one central government of the West African Settlements, based in Sierra Leone, although each colony kept its own administration. The incident in 1870 which sparked off the need for official action was an attack by natives on a British settlement in Sierra Leone beyond the reach of regular British administration. The village was destroyed and the in-



habitants killed or enslaved.<sup>36</sup> One native, Whobay, described as a professional cutthroat, had dragged off two female British subjects as his share of the booty. One woman refused to pound rice for him, so he chopped off her head. Although she had been captured in British territory it was not clear, since boundaries were inexact, whether the murder took place within or without British territory. In the face of such uncertainty the chief justice of Sierra Leone held he had no jurisdiction to punish Whobay. British traders in the area protested, claiming their lives were thereby endangered. Natives would soon realize that they could enter British territory, commit all manners of crime, and then flee to safety across inexact colonial boundaries.

Later the same year another incident arose where a Kru native who resided in the colony and regarded himself as a British subject murdered another native in an area outside the colony.<sup>37</sup> The Colonial Office considered that in the interests of justice and peace the murderer should be tried in the colony by English law. If the native had been punished in the place where the murder was committed, a Moslem area, his hands would have been cut off and he would have been delivered into slavery. British authorities wanted to avoid such barbarities.

The law officers proved obliging when the Colonial Office asked for suggestions as to how authority might be legally given for the punishment of people committing barbarities and crimes, not only on British subjects but also on Europeans and natives beyond the British frontiers.<sup>38</sup> The legal advisers recommended an imperial act extending British authority so as to include the punishment of crimes committed outside British territory but within a reasonable distance of it. No definition of "reasonable distance" was given. They justified the extension on the grounds of "the necessities of the case"; the usual principles controlling the mutual relations of states could be ignored since the area

36. Kennedy to Granville, June 7, 1870, C.O. 267/306/6868; Fyfe, *History*, p. 370-73.

37. Kennedy to Kimberley, August 3, 1870, C.O. 267/308/9033.

38. Collier, Coleridge, Twiss to Kimberley, July 20, 1870, C.O. 267/308/7846, September 6, 1870, C.O. 267/308/9655.



concerned was not a civilized state. Furthermore the lawyers considered the act could cover crimes committed against not only British subjects but also anyone who by residence within a British colony had acquired a British national character. The latter person was taken in international law to have acquired a British domicile which entitled him to British protection.

In the Colonial Office there were doubts and hesitations about the assumption of so much jurisdiction. Holland, an assistant under-secretary with legal training, foresaw much difficulty in framing the act; Rogers was most suspicious of such "delicate legislation."<sup>39</sup> He doubted the point on domicile and was quite opposed to the law officers' view of extending the legislation to crimes committed by persons from other civilized states. He knew the French would object to such jurisdiction. In his mind the legislation concerned only the natives of less civilized Africa. And the Foreign Office agreed with him.<sup>40</sup>

The law officers tried to justify their wide-sweeping approach by the simple and fundamental principle of the necessity of protecting life and property in districts where there was no law.<sup>41</sup> They feared that the object of the legislation might be defeated if it was known that a civilized man could commit with impunity acts for which a native was punished. But they allowed that the question was mainly one of policy and accordingly they were prepared to limit the application of the jurisdiction. "In the whole it seemed to us hardly worth while to extend our jurisdiction over certain territories unless that jurisdiction comprised all persons within them. We feel, however, that this is mainly a question of policy to be determined by H.M.G."

Both the Foreign Office and the Colonial Office took as their starting point the established legal principle that the consent either of a foreigner or of his government should be obtained before he could be compelled to submit to British foreign jurisdic-

39. Holland, see Appendix; minutes, Holland, September 8, 1870, C.O. 267/308/9655; Rogers, July 22, 1870, C.O. 267/308/7846; Rogers, November 24, 1870, C.O. 267/308/12168.

40. Granville to Collier, Coleridge, Twiss, December 9, 1870, F.O. 83/2362; Granville to Kimberley, December 24, 1870, C.O. 267/309/13375.

41. Collier Coleridge, Twiss to Granville, December 14, 1870, F.O. 83/2362.

tion. This certainly had been applied in the past in the case of the subjects of foreign civilized powers. The report of the law officers, however, implied that a different principle might pertain in less civilized territories, that there British foreign jurisdiction might be complete and exclusive regardless of consent. The Foreign Office and the Colonial Office preferred to follow the regular practice concerning foreigners. But the two departments themselves were advancing a new theoretical approach since they were prepared to legislate for an extension of British jurisdiction into nearby areas whether or not the rulers there had consented to such British interference.

The bill prepared by the Colonial Office aroused some criticism in the House of Commons on the grounds that it involved a new principle of jurisdiction. It was condemned as being unfair to the natives by making them subject in their ignorant state to British authority.<sup>42</sup> But the government stuck to its decision saying that the legislation was necessary to protect British subjects. The new law, the West Africa Settlements Act of 1871, extended the jurisdiction of the superior courts of the settlements to include offences committed within twenty miles of the boundary of settlements or adjacent protectorates by British subjects or persons not being the subjects of any civilized power against British subjects or persons resident within any of the settlements.<sup>43</sup>

The legislation involved an extension of previous legal theory on British jurisdiction in areas outside its dominions. It was not a development of the foreign jurisdiction legislation but was more akin to the Cape and Sierra Leone Offences Acts. Now the jurisdiction was to embrace more than British subjects. At the same time certain restrictions were imposed. Firstly there was a geographical limitation and secondly, in actual fact, it was necessary that the offending native be apprehended in the settlements or protectorates.

Apart from the jurisdictional points involved the legislation

42. Fowler, McArthur, March 21, 1871, 3 *Parl. Deb.*, CCV (1871), 406-07.

43. 34 & 35 Vict., c. 8.

was also significant for its light on the decision-making process. Although a number of legal points were concerned the relevant decisions and the final solution came from within the two departments and not from the legal advisers. In the eyes of the departments the law officers had proved rather unhelpful, even inexact, since their reports were so broad and permissive. The law officers had not come up with definite, constructive suggestions in law as to how much or what kind of jurisdiction might be exercised. On the contrary their answers were vague as to the principles and limitations involved. The initiative and the ideas for a solution came from within the departments, primarily the Colonial Office. Of course, in the final solution, a number of practical arguments were of major importance. Limits on jurisdiction had to be set since the colonial administrators in London were unwilling to undertake so extensive a jurisdiction and responsibility as the law officers had urged. Yet the Colonial Office and the Foreign Office had expected a more definite statement by the lawyers on the legal and theoretical principles involved, but this the latter failed to give.

The West Africa Settlements Act proved difficult to put into operation and its effectiveness was somewhat reduced. Believing themselves to be following a law officers' report of 1874,<sup>44</sup> the local authorities in West Africa adopted a very strict standard of proof of nationality, as to whether the accused was a British subject or a person not from a civilized country. This interpretation allowed a number of natives to escape conviction, a situation which brought complaints from British residents. In 1886 Governor Rowe of Sierra Leone pointed out the difficulties in the act and claimed that disastrous disorders on the border were attributable to it.<sup>45</sup>

The Colonial Office hoped that the deficiencies might be remedied by amending legislation. But on this occasion a different set of law officers was not so agreeable, describing the legislation as an anomaly in that it assumed criminal jurisdiction over foreigners beyond the lines of the general principles of interna-

44. Baggallay, Holker to Carnarvon, June 15, 1874, C.O. 885/12.

45. Rowe to Granville, June 4, 1886, C.O. 267/366/11048.

tional law.<sup>46</sup> Although they did not say so directly the lawyers seemed to be arguing that no distinction should be drawn between a native and a foreign subject of a civilized power.

The amendment was dropped; but the Colonial Office was in no mood to repeal the legislation. The matter was brought to a satisfactory close through the juggling of legal technicalities. Fairfield and Bramston in the Colonial Office reconsidered the matter and agreed that the local authorities had misread the degree of proof required.<sup>47</sup> At the same time, the Colonial Office did not feel it could blatantly ignore the advice of the law officers on the nature of the legislation. So the suggestion was put to them that the strict degree of proof was not necessary; and the lawyers agreed.<sup>48</sup> So the act was allowed to continue in operation although it had been condemned in principle by one set of law officers.

The West Africa Settlements Act provided the basis for similar legislation dealing with native territories adjacent to the colony of the Straits Settlements on the Malay Peninsula. The only areas of British control were Singapore, Penang, and Malacca. The rest of the peninsula was divided into a number of states, most standing in some form of tributary relationship to the king of Siam. By virtue of Orders in Council under the Foreign Jurisdiction Acts British consular authority centered in Bangkok spread over the Malay Peninsula, but the Colonial Office and the governor of the Straits Settlements decided that a more effectual system for the prosecution of offenders and the extension of extraterritorial jurisdiction should be provided.<sup>49</sup> In 1874, following the West Africa example, the Colonial Office proposed legislation asserting British jurisdiction over adjacent territories and providing for its administration by the courts of law in the settlements.

46. Russell, Davey to Granville, August 5, 1886, C.O. 267/366/14089. At the same time, they agreed that as a matter of policy, the Colonial Office could proceed with the amendment although they warned diplomatic complications might arise from it.

47. Minute, Bramston, November 9, 1886, C.O. 267/365/19901; Fairfield, Bramston, see Appendix.

48. Webster, Clarke to Stanhope, November 30, 1886.

49. Ord to Kimberley, June 27, 1873, C.O. 273/67/8351.



The law officers approved the principle of the legislation which could be taken to affect all persons in the territories.<sup>50</sup> They saw no jurisdictional problems although they acknowledged that the bill went further than existing consular arrangements for the area and embraced persons and crimes not hitherto affected. The legislation did not receive such favorable comment in Parliament. Sir William Harcourt attacked the wide scope of the bill and was successful in securing an amendment of the original draft to the effect that Chinese would be excluded from its operation.<sup>51</sup> He also protested that it would involve Britain in wars with uncivilized powers. Lord Stanley of Adderley complained in the House of Lords that the bill contravened the law of nations since it ignored the principle that the consent of the sovereigns of the countries affected should be obtained.<sup>52</sup> His protests were passed over and the legislation—the Courts (Straits Settlements) Act of 1874—went into operation, conferring on the courts of the colony jurisdiction over crimes committed out of the colony by British subjects or any person a subject of the native states.<sup>53</sup>

These developments, the West Africa Settlements Act and a similar act for the Straits Settlements in 1874, adopted the tactic of legislating out of a difficulty. They were not related to the system of extritoriality based on the Foreign Jurisdiction Acts. But developments in the Gold Coast in the 1870s made it both desirable and necessary that this second approach be availed of further to settle jurisdictional and administrative problems in areas near the colony but not directly under British control. Again, as in the 1840s and 1850s, it was the Colonial Office, and not the Foreign Office, that resorted to this device. The Colonial Office, through the very fact of its colony of the Gold Coast, took responsibility for that coastline and felt itself directly concerned for affairs with the hinterland; the Foreign Office came in only

50. (Copy) Coleridge, Jessel, Deane to Granville, September 30, 1873, included in Granville to Kimberley, October 9, 1873, C.O. 273/73/10716; also, Baggallay, Holker to Carnarvon, May 1, 1874, C.O. 273/77/4862.

51. Harcourt, June 25, 1874, 3 *Parl. Deb.*, CCXX (1874), 479.

52. Stanley, July 17, 1874, 3 *Parl. Deb.*, CCXXI (1874), 173-76.

53. 37 & 38 Vict., c. 38. Geographical limits, which do not concern us, were set—territories south of nine degrees of south latitude or within twenty miles of the coast.



if foreign civilized powers were concerned. Again, although the Colonial Office did not normally resort to the Foreign Jurisdiction Acts, in this case it did since it was building upon the groundwork already laid by the Order in Council of 1844 and subsequent actions arising out of it.

In 1874 the Gold Coast was again separated from the control of the Sierra Leone government and erected into a separate colony. The problem still existed of how to regulate the nearby "protected" areas that had begun in Maclean's time and had expanded since then through British contact. Even if the Colonial Office had wanted to (partly in accordance with the instructions of the 1865 select committee), the serious Ashanti war that broke out in 1873 made it obvious that the British could not withdraw from the area and leave the nearby "protected" tribes to defend themselves.<sup>54</sup> Already the system of protection had developed sufficiently to induce in the British mind a sense of moral obligation towards the peaceful peoples of the areas adjacent to the colony who had come increasingly to depend on British aid. So in 1874 the Colonial Office decided that the local legislature should exercise a more direct jurisdiction in the adjacent protected territories.<sup>55</sup> Apart from the defence problem two other factors prompted official action. It was hoped that through a more direct control the continuing problems of slavery and pawning could be checked. Furthermore the chief magistrate suggested in 1872 that legal doubts should be resolved to ensure that colonial authorities could collect customs duties and legislate generally for the protected territories.<sup>56</sup> In other words British involvement was becoming so heavy that administrative efficiency demanded that Britain have greater legal power to direct the affairs of those territories; Britain needed not only judicial but also a general political and administrative authority. At the same time confusion still existed about the legal relationship be-

54. W. E. F. Ward, *A History of Ghana* (revd. 2nd ed.; London: Allen and Unwin, 1958), pp. 261-62. Note that Ward wrongly states that "the British Government decided to grasp the nettle and to annex the 'Protectorate'." Note the comments on this point made by McIntyre, *Imperial Factor*, pp. 281, 284-85.

55. For background, see Fairfield memorandum, March 19, 1874, C.O. 879/6; also minute, Holland, May 21, 1874, C.O. 96/111/5542.

56. Kimble, *A Political History*, p. 302.

tween the colony and the protected territories and the powers that could already be legally exercised in the latter. Since 1844 British power and authority, both political and administrative, had been increasing in the area but no adequate legal definition had ever been made of it.

The Colonial Office wanted to sanction officially the use of these wider political and administrative powers by Order in Council. The law officers pointed out that the 1856 Order in Council was insufficient to bestow such sanction since it was restricted in operation to judicial matters only.<sup>57</sup> Consequently, if it was intended to give the local legislature power to make regulations respecting the whole of the queen's jurisdiction, administrative, political and judicial, a further Order in Council would be necessary.

Holland drafted the new order under the Foreign Jurisdiction Act and it issued in August 1874, authorizing the Legislative Council of the Gold Coast to regulate by ordinance the exercise of those powers that the crown possessed in the adjacent territories.<sup>58</sup> No attempt was made to define the powers or set limits to the adjacent territories; nor was the word "protected" used, presumably to avoid complications in definition.<sup>59</sup> But Holland himself had immediate qualms about the basis of this extended jurisdiction. To protect the government in this exercise of authority he proposed that some form of distinct agreement or approval should be obtained from the chiefs concerned about the amount of jurisdiction that the Gold Coast legislature could exercise.<sup>60</sup> He wanted to ensure that the new order did not amount to an annexation by Britain or a derogation from the just power of the native kings and chiefs over their people.

Practical objections were soon raised to the obtaining of such an agreement. British officials, whether in London or on the

57. Baggallay, Holker to Carnarvon, June 24, 1874, C.O. 96/113/7136.

58. Order in Council, August 6, 1874.

59. Although the words "protectorate" or "protected territories" were used in correspondence and memoranda, they were avoided in legal and constitutional documents; the one outstanding exception is the 1871 West Africa Settlements Act where jurisdiction was extended twenty miles from "adjacent protectorates," but here also the term was not defined.

60. Minute, Holland, June 25, 1874, C.O. 96/113/7136.

spot, wanted to avoid arousing the suspicion or hostility of the chiefs by opening negotiations with them to secure an actual surrender of their administrative rights. If the chiefs already in practice accepted that they had given up these rights it seemed foolish for British officials to resurrect the grant because of legal quibbles. The Colonial Office decided to play safe by resorting to the formal position that since the British crown already held these rights, by usage, sufferance, or tacit assent, if not by direct agreement, the amount of jurisdiction to be exercised could be declared by proclamation of the governor. Lord Carnarvon, the colonial secretary, thought this would be the preferable method to assure British interests.<sup>61</sup>

Even this easy solution created problems. The governor of the colony complained that it was difficult to explain in a proclamation the actual limits of jurisdiction.<sup>62</sup> The Colonial Office appreciated the difficulty and agreed that the chiefs might take this as an attempt to usurp rights not already possessed. To cut through this jurisdictional knot, Pauncefoot recommended that the governor be informed, by Private Instructions, about the powers and jurisdiction of the queen in the adjacent territories.<sup>63</sup> It would not be necessary to define the nature or the limits of British power. Instead the governor was simply informed that his jurisdiction was not in any way enlarged upon the jurisdiction already possessed and exercised by Her Majesty under the Foreign Jurisdiction Act.

The problems involved in the issue of this order indicated clearly that British officials did not at this stage understand the exact nature and limits of their responsibilities and jurisdiction in the "protected" areas adjacent to the Gold Coast colony. But they were prepared to legalize the exercise of rather wide powers in the area. Legislative and administrative responsibilities were acknowledged; and the local legislature was empowered to make regulations having effect in the protected territories, even though

61. Minute, Carnarvon, July 13, 1874, C.O. 96/113/7136.

62. Strahan to Carnarvon, secret, March 27, 1875, C.O. 96/115/4825.

63. Minute, Pauncefoot, September 17, 1875, C.O. 96/115/4825; Carnarvon to Strahan, secret, October 8, 1875, C.O. 96/115/4825.

there was no intention of declaring British sovereignty there. They were prepared to take this step because in the Gold Coast exceptional circumstances from early in the century had created a wide but indefinite jurisdiction and influence for Britain; this situation was not paralleled elsewhere, for example, in the Oil Rivers area. The Gold Coast was in advance of other West African areas in jurisdictional matters; and British authorities could always take legal refuge in the argument that their actions were justified by sufferance on the part of the Africans.

This order was an important first step in the assumption of imperial responsibility in the less civilized areas of the world. Through the ideas of Colonial Office staff like Holland and Pauncefoot, both of them trained lawyers, a legal means was devised for the exercise of as full an authority as was desired over people and territory not under the control of the British crown. It was not, however, until the mid-nineties that further use was made of this legal device. The failure to use this machinery elsewhere in the 1870s can be explained largely because imperial planners in the Colonial Office and the Foreign Office were not anxious to extend the range of British responsibility into the interior of Africa unless it became a matter of necessity because of military or local pressure. Such reluctance meant that British knowledge and official thinking on "protected" and "adjacent" areas tended to remain vague and elusive. The lawyers themselves had given little thought to the matter. This was particularly true of the law officers of the crown who allowed themselves to be led by the instructing department whenever a protectorate question arose. They were quite permissive as to the extent and nature of British jurisdiction in these areas, as indicated in their 1870 advice on the West Africa Settlements Act. Their attitude was shaped very much by the principle of condoning formally the existing practices. Such an approach was not an unwise one for an administrator but on occasions the Colonial Office and the Foreign Office found it more than they wanted. Approval of existing practices might mean the assumption of too many imperial responsibilities and so the two departments found themselves on occasions restricting the amount of authority that the lawyers had approved.



The most acute knowledge of protectorates was to be found with the legally trained officers in the departments, advisers like Holland and Pauncefote, although even in these two people no deep understanding of protectorates was shown. Statute-created jurisdiction was one method they used to effect British control where it was needed. The other usual outlet was through the Foreign Jurisdiction Acts which were used in two ways. In the Oil Rivers the acts were followed in a fairly strict manner, with a limited application. But in the Gold Coast easily extendable machinery was created allowing a significant British control if needed. Overall, British colonial theory on protectorates, from mid-century to the mid-eighties, was vague and flexible. It allowed a variety of responses to local situations because the law on the topic had not yet been clarified sufficiently to admit the development of a more uniform response. Furthermore the actual emergence of a particular protected area was so haphazard and so much shaped by local circumstances that it was difficult for planners in London to apply their scanty knowledge of protectorate jurisdiction to the situation until local practices had become sufficiently established to set the pattern of protection and jurisdiction.

Developments in West Africa since the 1840s indicated that the British government took two basic approaches to problems of law and order and the provision of some degree of British jurisdiction in the area. Special legislation could be used. The Colonial Office resorted to this in the case of the West Africa Settlements Act of 1871. The more usual approach was to use the enabling provisions of the Foreign Jurisdiction Act of 1843. And one should notice that during this mid-century period the Colonial Office as well as the Foreign Office used this legislation. So, in the 1840s and 1850s the Colonial Office arranged the issuance of Orders in Council providing for the exercise of jurisdiction in accordance with that legislation in areas near its colonies of the Gold Coast and Sierra Leone. In the 1870s the Foreign Office did the same with respect to the Oil Rivers while the Colonial Office again resorted to the Foreign Jurisdiction Acts in 1874 when following up further jurisdictional problems in the Gold Coast hinterland. Unlike the Foreign Office the Colonial Office



avoided using the consular service to effect the exercise of whatever jurisdiction Britain possessed in these areas. Instead the Colonial Office arranged for the nearby colonial legislative, executive, and judicial bodies to exercise the jurisdiction. To ensure the legality of such action the Colonial Office claimed in the earlier situations in the Gold Coast and Sierra Leone that the jurisdiction was exercised not only under the Foreign Jurisdiction Act but also under the Coast of Africa and Falkland Islands Act of 1843. Overall the Colonial Office took a more fluid and expansive view towards the exercise of extraterritorial jurisdiction than did the Foreign Office during this period. The latter stuck fairly closely to the terms of the enabling legislation while the former office was willing to operate a wider scope of jurisdiction. The period, in fact, was one when the Colonial Office seemed quite willing to allow or even to be innovative in creating a broad basis of jurisdictional authority to control undesirable problems of lawlessness and disorder in areas near to its West African colonies.

## Sovereigns in the Pacific

It was not until 1875 that an effective basis was established for obtaining jurisdiction in Pacific islands outside the British dominion and even then it was over British subjects only. Furthermore, that result was obtained only after much perseverance on the part of the Colonial Office and the Foreign Office. Various attempts were made and various approaches adopted over the fifteen years prior to 1875—imperial legislation, orders in council under the Foreign Jurisdiction Act, extension of consular powers, improvements in the court facilities of nearby British possessions, adaptations of the slave trade legislation. But every attempt, every approach between 1859 and 1875, was frustrated for a number of reasons—legal, financial, political.

The problem of establishing British jurisdiction and control in the Pacific was similar to that in the scattered regions of Africa, especially West Africa, where British settlers, traders, missionaries, and vagrants resorted. British subjects spreading through the numerous islands of the Pacific found themselves outside the limit of English law. A number fought and brawled with one another, some mistreated the natives, and some indulged in slave trading (called the labor trade in the Pacific).<sup>1</sup> The control of such abuses, whether in Africa or the Pacific, was a never-ending worry for imperial officials in Whitehall.

The earliest device used by the Colonial Office to give British

1. For general background on the problem of lawlessness in the Pacific and the solutions that were adopted see William P. Morrell, *Britain in the Pacific Islands* (Oxford: Clarendon Press, 1960), chaps. vi, vii, xii; J. D. Legge, *Britain in Fiji, 1858-1880* (London: Macmillan & Co. Ltd., 1958), chap. v; John M. Ward, *British Policy in the South Pacific (1786-1893)* (Sydney: Australasian Publishing Co. Pty. Ltd., 1948), chaps. iv, vi, xvii, xxi.

authorities on the spot some power and jurisdiction to control troublesome behavior by British subjects in the area was legislation. The 1817 act has already been noticed; in 1828 another act was passed to assist court operations in the area.<sup>2</sup> This was a general enactment applying to offences committed at sea and in places where Admiralty jurisdiction ran and in New Zealand and other places in the Pacific and Indian oceans which were not under the sovereignty of Britain or any European state; and it applied to the master and crew of British ships and British subjects living in those areas. The Supreme Courts of New South Wales and Van Diemen's Land, being nearest, were empowered to try such offences. The legislation proved in practice to be very inadequate because of the difficulty and expense of obtaining proper evidence; and, obviously the action of those courts could not be sufficiently prompt or certain to control or deter significantly violence and disorder on the part of British subjects.<sup>3</sup>

Another approach to the problem was for Britain to establish a base in the Pacific as a jurisdictional center rather than attempt to operate from the colonial fringe of Australia and New Zealand. The Fiji islands, about 1,900 miles from Sydney, were an obvious choice for the South Pacific. After 1835, British subjects—missionaries, traders, and settlers—began resorting to those islands in ever-increasing numbers, and with them came more persistent jurisdictional problems.

The control of the Fiji islands could have been easily settled in 1859 when chief Cakobau, the most powerful of the chiefs, offered to cede the sovereignty of the islands to Britain.<sup>4</sup> This offer was refused, partly because the British government was unwilling to undertake wide-ranging responsibilities in the area and partly because of legal doubts that the chief was competent to

2. The Australian Courts Act of 1828, 9 Geo. IV, c. 83, s. 4.

3. Granville to Collier, Coleridge, December 29, 1869, C.O. 885/11; Rogers to Hammond, February 26, 1869, *Confidential Print*, Australia No. 12, C.O. 881/12.

4. For background, refer to Morrell, *Britain in Pacific*, pp. 131–37, Legge, *Britain in Fiji*, pp. 28–30, and Ward, *British Policy*, pp. 186–92; Pritchard to Malmesbury, February 8, 1859 in Hammond to Merivale, February 18, 1859, "Correspondence Relative to the Fiji Islands," [2995], pp. 3–4, and Smythe to Newcastle, May 1, 1861, pp. 28–33, *P.P.* 1862, XXXVI.

make the grant. Rather than accept the cession, British officials thought sufficient authority might be exercised if the power of the consul stationed at Fiji was built up, primarily by giving him the power to act magisterially under the Foreign Jurisdiction Act.<sup>5</sup> To achieve this end, a treaty with the native rulers conceding that power was necessary. There existed, however, the practical problem that this might not be easy to obtain and, furthermore, there was the same legal doubt that existed in the offer of cession as to whether any authority in Fiji was sufficiently sovereign to enable Britain to obtain a treaty granting such rights.<sup>6</sup>

In the following years through negotiations between island rulers and British officials various grants of jurisdictions were made. And theoretical doubts about their validity and effectiveness were set at rest in 1866 when the law officers made a favorable report. They asserted that the crown had validly acquired jurisdiction there, either by "sufferance" or by "treaty" or by both.<sup>7</sup> The lawyers took as a precedent the Sierra Leone example of 1850. So, approval was given in principle that an Order in Council should issue under the Foreign Jurisdiction Act granting a limited jurisdiction over British subjects. This power was to be exercised by consuls and certain naval officers. A British consul had been appointed to Tahiti in 1837; he transferred to Samoa in 1845 and ten years later the British government approved the appointment of a consul for the Fiji islands.

The actual issue of such an order became a protracted matter. Upon instructions from the Foreign Office, Francis Reilly, the parliamentary draftsman at the Treasury, drew up a draft modelled on the Siam Order of 1856 and incorporating recent improvements made in the China and Japan Order of 1865.<sup>8</sup> It

5. Memorandum, Wylde, March 11, 1863, F.O. 58/124.

6. Memorandum, Wylde, March 22, 1866, F.O. 58/124.

7. Cairns, Bovill, Phillimore to Stanley, October 30, 1866, F.O. 83/2314. Note that Francis T. Piggott, *Exterritoriality* (London: William Clowes and Sons, Ltd., 1892), p. 52, claimed that Zanzibar appeared to be the only case where jurisdiction was obtained by "sufferance"; but he overlooked at least three cases—the Gold Coast (1844 and 1874 Order in Council), possibly Sierra Leone, and this Fiji example.

8. Reilly, see Appendix; memorandum on British jurisdiction in Fiji islands, Reilly, January 16, 1868, F.O. 58/124.

was provided that the order should be restricted to British subjects and to the Fiji islands, rather than the whole of the Pacific.

Two years later, in 1868, the draft order was still being discussed. A new set of law officers reviewing the matter considered the case "very peculiar" and did not display the same favorable disposition towards the order as their predecessors had.<sup>9</sup> The former were troubled by the apparent lack of a sovereign power in the islands; instead, they saw a number of marauding chiefs with power determined by their strength and the number of their followers (who shifted allegiance at will). Looking at the negotiations conducted since 1859 between British consuls and native chiefs, the lawyers doubted that there was any valid "treaty" upon which jurisdiction could be said to be founded. So the validity of the proposed order would have to depend upon whatever power had been gained by "sufferance" and not by "treaty." Nevertheless, after expressing their doubts, the lawyers went on to allow the order and to condone this "straining" of the Foreign Jurisdiction Act.

Upon considering this report Reilly himself had second thoughts. At the initial drafting he had accepted without question that Her Majesty had already acquired jurisdiction there and for this he had relied upon the law officers' report of 1866. Now, in 1868, he reconsidered the matter with Captain H. M. Jones, lately the consul in the islands, and came to the conclusion that no sufficient jurisdiction had ever been exercised in the Fiji islands to warrant the passing of the order.<sup>10</sup> A possible solution to this impasse was to ask Parliament for legislation bringing the Pacific islands within the scope of the Foreign Jurisdiction Act even though there might be no island authority competent to grant extraterritorial rights to Her Majesty by treaty or otherwise.

The Foreign Office considered that such a step needed first to be approved by the law officers. To make the suggestion more palatable to the lawyers it was proposed that the imperial legis-

9. Karslake, Brett, Twiss to Stanley, May 18, 1868, F.O. 83/2314; Legge, *Britain in Fiji*, pp. 116-18.

10. Reilly's opinion, July 14, 1868, F.O. 83/2314, in Stanley to Karslake, Brett, Twiss, July 16, 1868, F.O. 83/2314.



lation should create the post of commissioner with power to exercise a limited jurisdiction in civil and criminal cases over British subjects resident in the Fiji islands and such other islands in the Pacific where Her Majesty might need jurisdiction because of the absence of a regular government. This proposal was readily endorsed by the law officers.<sup>11</sup>

In preparing the legislation Reilly sought to cover up any suggestion that the bill was creating jurisdiction where it had never existed before. He denied that he was establishing a novel system and asserted that this case was merely an application of the Foreign Jurisdiction Act, but with the language extended; the Fiji case clearly came within "the spirit" of the act.<sup>12</sup> But this claim was not very convincing, at least so far as the Treasury was concerned. That department always became interested in foreign jurisdiction matters as soon as a question of public expenditure arose. Treasury officials objected to the proposed legislation on two grounds—financial and legal.<sup>13</sup> On the latter point they observed that the bill bestowed on the queen jurisdiction where it had never existed before. The Fiji islands were territories which, being inhabited only by savages, could have been acquired by any civilized power, but Her Majesty had not thought fit to do so. There was, of course, the usual, underlying, financial objection—that if jurisdiction were taken in Fiji it would be necessary to establish courts to administer it and that would involve the provision of a government, of taxes, and of police. The Treasury added the solemn warning derived from past experience: "All these things being created under British law must, my Lords apprehend, in the too probable case of default, be supported from Imperial resources." Their policy was to limit British responsibilities that might arise through an assumption of jurisdiction in the area. As an alternative it was suggested that the supreme courts of the Australasian colonies be given jurisdiction over British subjects in the Fiji islands. This solution was already, in fact, partly in operation but was proving unsatis-

11. Karslake, Brett, Twiss to Stanley, August 18, 1868, F.O. 83/2314.

12. Memorandum, Reilly, January 1, 1869, F.O. 58/124.

13. Treasury to Clarendon, January 26, 1869, F.O. 58/124.

factory; to the Treasury, however, it had the advantage of cheapness.

The Foreign Office was almost at an impasse as to the course of action to take. No agreement could be reached among the various London advisers. Meanwhile, John Thurston, the acting consul at Fiji, urged that a protectorate be established to handle the problem of the increasing influx of British residents.<sup>14</sup> He even raised the possibility of military aid because of American interest in the area. The Colonial Office could offer no helpful advice; its suggestion that an adaptation might be made of an act of the United States Congress asserting an extraterritorial jurisdiction in the area was dropped when the act was found to be inoperative.<sup>15</sup> Faced with such negative prospects the Foreign Office made a further appeal to the law officers in the hope that the latter might be able to suggest some mode by which the powers of the consul could be beneficially extended. But the law officers had nothing to offer, conceding defeat to the "difficulties inherent in the subject."<sup>16</sup>

Ten years after the offer of cession no adequate British jurisdiction had yet been established in Fiji, or elsewhere in the Pacific. The same two interrelated problems still confronted policy-makers—the absence of an effective, regular government in the area, and the inability of Britain to acquire a valid jurisdiction there. Basically the problems took their root in an inconvenient legal approach—Britain's necessity to deal with a regularly, constituted state, one which although not fully Western in nature was sufficiently well-established and legitimate to receive recognition by a Western state. Such conditions were very hard to fulfil in Fiji in the 1860s. Practically, there existed a great need for Britain to establish some form of effective control but legal principles frustrated such steps. At the same time the lawyers had proved indecisive, indeed contradictory, between 1866 and 1869 and had been unable to offer any constructive help in the acquisition of jurisdiction. To the Foreign Office there seemed

14. Clarendon to Granville, February 2, 1869, F.O. 58/124.

15. Granville to Clarendon, February 26, 1869, C.O. 881/2.

16. Collier, Coleridge, Twiss to Clarendon, May 15, 1869, F.O. 83/2314.

no choice but to drop the proposed legislation for an Order in Council.

Meanwhile, during the 1860s, another aspect of jurisdiction in the Pacific was troubling administrators in London; indeed, official British interest in the Pacific can be regarded as arising primarily out of their concern for this problem—the labor trade.<sup>17</sup> The need to check white lawlessness and to provide some form of jurisdiction reflected a desire not to establish a British system of government in the area but rather to prevent the abuses of kidnapping and the labor traffic committed against the island natives.

Australian interest in Pacific natives for work on white plantations arose in the 1840s when some were transported to New South Wales. In the 1860s renewed interest was shown in the islanders, first by Peru and later by Queensland; in the latter case they were obtained for cotton and more importantly for sugar. In addition, significant trafficking developed among the Pacific islands themselves, particularly with white owners in Fiji seeking labor from other islands.<sup>18</sup> So far as British subjects were concerned there already existed a number of British slave trade and crimes acts that could be applied anywhere against certain violent crimes.<sup>19</sup> But problems arose in implementing the legislation in the area and during the 1860s London and Australian authorities wrestled with legal technicalities to improve the legislation.

The courts of the Australasian colonies were the normal venue for legal action arising from the slave trade legislation but the cause of justice in those courts was often hampered by the difficulty of obtaining evidence for the prosecution. Following colonial complaints the Colonial Office in 1862 made various legislative proposals, under Law Office advice, to facilitate the production of witnesses. This was done in the hope of checking miscarriages of justice in cases where a conviction was appropri-

17. Refer to O. W. Parnaby, *Britain and the Labor Trade in the Southwest Pacific* (Durham, N.C.: Duke University Press, 1964).

18. For background, see Ward, *British Policy*, pp. 218–21, Morrell, *Britain in Pacific*, pp. 171–75.

19. For example, 5 Geo. IV, c. 113 (Slave Trade Consolidation Act), the Australian Courts Act of 1828 above, 6 & 7 Vict. c. 98.

ate but could not be obtained for lack of evidence.<sup>20</sup> The Treasury, however, held up this solution, objecting to the probable cost of carrying out these judicial functions.<sup>21</sup> The Colonial Office thereupon dropped the idea of streamlining judicial facilities and procedures.

But six years later the legislation was resurrected. In 1868 the Queensland government had passed legislation with the intention of regulating conditions of transportation and employment of Pacific labor.<sup>22</sup> But neither local nor imperial legislation could comprehend the range of illegal operations carried on by white traders, as the case of the schooner *Daphne* well illustrated. Although islanders had been transported under shocking conditions in the vessel, a court in Sydney had been obliged to dismiss charges because of deficiencies in the legislation. Faced with the need for taking more effective action the Colonial Office asked the law officers what steps might be taken to regulate the immigration of island laborers into Queensland and to prevent abuses; it also hoped to put an end to interisland kidnapping and to facilitate the apprehension and trial of British subjects engaged in such practices.<sup>23</sup> Officials in London were becoming concerned that conditions in the South Pacific might degenerate further allowing the rise of a general system of kidnapping and slave trade. The existing powers and jurisdiction of the consul at Fiji were very limited so far as concerned offences arising out of the kidnapping system. A model for slave-trade jurisdiction had existed since 1866 in the case of the British consul at Zanzibar. Yet the legal problems involved in extending the powers of the consul at Fiji as indicated above forbade the adoption of the Zanzibar system.<sup>24</sup> So the Colonial Office in 1869 suggested to

20. Bethell, Atherton to Cardwell, July 18, 1860, C.O. 885/10; also, Collier, Coleridge to Granville, January 11, 1870, C.O. 201/560/525; see O. W. Parnaby, *Britain and the Labor Trade*, p. 9.

21. See Granville to Clarendon, February 7, 1870, F.O. 57/127; memorandum for cabinet, "Abuses Connected with Polynesian Immigration," Dealtry, January 29, 1872, P.R.O. 30/29/69 Granville MSS.

22. (Queensland Act) 31 Vict., no. 47.

23. Granville to Collier, Coleridge, December 29, 1869, C.O. 885/11.

24. See Zanzibar Order in Council, 1866; R. Coupland, *The Exploitation of East Africa, 1856-1890; the Slave Trade and the Scramble* (London: Faber and Faber, 1939), p. 162.



the law officers various alternatives which might improve British jurisdiction and control in the Pacific—imperial legislation, local legislation, extension of consular powers, the mission of a commissioner with special powers and instructions, or other means. To assist the law officers the Colonial Office submitted their 1862 bill dealing with evidentiary and procedural points.

The lawyers approved that bill as essential if any success was to be achieved in the control of the trade.<sup>25</sup> But they recognized that this would not be enough if it was intended to combat the really serious evils of the labor traffic system. Imperial legislation, wide in scope and in range, was necessary since colonial legislation, like the existing Queensland Act, could not extend beyond the colonies. The most satisfactory solution was to extend the Foreign Jurisdiction Act to the Fiji islands and neighboring areas. But this answer was not available because the British government refused to recognize the government at Fiji as one sufficiently established to conclude treaties granting jurisdiction to foreign powers. Even though France and the United States of America had endorsed that government, British policy was frustrated by this legal consideration. So the lawyers had to state that the former difficulties in the way of extending that act appeared to “remain in undiminished force” unless or until English policy towards the local government was altered.

In any case the law officers thought that a greater check on the labor traffic might be obtained by new imperial legislation. They outlined a bill providing for the punishment of interinsular kidnapping and the decoying of natives. Furthermore, they considered that it would be useful to empower a commissioner, probably the consul, to issue regulations concerning transportation and the administration of justice. His powers would, however, still be limited because they were subject to the continuing problem of British recognition of the native government of Fiji. The lawyers also added a practical comment that the success of the scheme depended upon the British government obtaining the cooperation of the French and United States governments in

25. Collier, Coleridge to Granville, January 11, 1870, C.O. 201/560/525.



the area. Experience with slave-trade problems in Africa indicated that international cooperation was necessary.

The lawyers' advice created rather than solved problems for the Foreign Office. Firstly, it was doubted that the two foreign governments would give the necessary consent and cooperation.<sup>26</sup> Secondly, the lawyers' proposals seemed to contemplate that the British commissioner or consul have power over foreign subjects but on general legal grounds this was questionable. Nevertheless, Lord Clarendon, the foreign secretary, decided to accept the advice concerning new imperial legislation and a commissioner.<sup>27</sup> At the same time doubts still existed in the Foreign Office as to the means to be adopted to secure the objective of curtailing kidnapping. So another reference was made to the law officers, partly in the hope of obtaining from the lawyers a wider concession of power for the commissioner making regulations.<sup>28</sup> For instance, it was desirable that the consul be given broad powers of apprehension, along with authority to send offenders for trial before Australian courts. So far as Fiji itself was concerned the Foreign Office stressed the advantage that could be derived if the proposed enactment strengthened the hands of the British consul there in enforcing general discipline over British subjects. The law officers were reminded of the "peculiar circumstances" under which the British community could often afford to ignore the consul's authority.

The law officers supplied no new answers or concessions.<sup>29</sup> They stalled giving any definite approval to the particular questions raised, merely advertng to their earlier report. To the necessity of obtaining French and American consent to consular jurisdiction they added that the Australian colonies should be asked whether they consented to the deportation of kidnapping offenders under the proposed legislation. This was another blow to Foreign Office plans.

It was not only the Law Office that frustrated the attempt to

26. Minute, Clarendon, February 15, 1870, F.O. 58/127.

27. Clarendon to Granville, February 18, 1870, C.O. 201/561/1963.

28. Clarendon to Collier, Coleridge, Twiss, February 25, 1870, F.O. 834/9.

29. Collier, Coleridge, Twiss to Clarendon, March 12, 1870, F.O. 834/9.

devise a satisfactory answer to these Pacific problems; the Treasury stuck to its financial strictures. The Colonial Office had gone ahead with the preparation of a draft bill to arrange for the use of the Australian courts and generally to facilitate the conviction of persons guilty of offences against islanders. But the Treasury refused to consider defraying from imperial funds further financial responsibilities, such as the cost of witnesses, on account of the hearing of kidnapping cases.<sup>30</sup> The Treasury's attitude was that the colonies should take some responsibility and bear some of the cost of these matters. The colonies, for their part, showed little enthusiasm for any suggestion that they could pay some of the costs of justice in the Pacific.

The Foreign Office, in the face of this series of objections and frustrations, was ready to wash its hands of the whole question of jurisdiction in the Pacific. But the pressure of events in the area would not allow even this solution. During 1870 consul March kept urging the Foreign Office to take definite action to control the lawlessness, including the labor traffic, in the South Seas. The number of European settlers was increasing—about 1400 British and 300 others, mainly German and American. With the conditions in Fiji deteriorating March pointed out that the code of laws drawn up in 1870 was for all practical purposes a dead letter.<sup>31</sup> The chiefs entirely disclaimed any jurisdiction over foreigners and looked to the consul to exercise over his own countrymen the same power and authority that they took over the natives. Under such circumstances it seemed obvious to March that the consul should be afforded a more efficient and regular authority to handle cases, especially in view of the likeli-

30. Rothery to Treasury, June 8, 1870, C.O. 885/11; also, memorandum for cabinet, "Abuses Connected with Polynesian Immigration," Dealtry, January 29, 1872, P.R.O. 30/29/69 Granville MSS; Colonial Office circular to Australian governors, April 20, 1871, P.R.O. 30/29/69 Granville MSS. Parnaby, *Britain and the Labor Trade*, p. 27, lays most blame on the Treasury, plus some delay on the part of the Foreign and Colonial Offices. Although this is true he misses the point of legal problems. He refers very little to the problems of extritoriality and to the confusion and lack of understanding in the three departments over this matter. Parnaby partly corrects the legal omission on p. 37 although he does not explain it fully.

31. March to Clarendon, May 17, July 17, 1870, F.O. 58/124; the population estimate is in memorandum, March, May 3, 1873, C.O. 881/3.

hood that those cases would become more numerous as more settlers arrived.

In response to such pressures the Foreign Office tried again to solve the problem of jurisdiction in Fiji. In 1871 an Order in Council was prepared conferring on Her Majesty's consul in the Fiji islands magisterial powers under the Foreign Jurisdiction Act to deal with crimes and offences committed by British subjects within his consular district.<sup>32</sup> This time the law officers approved the draft, upon the assumption that there already existed, at least by sufferance, some sort of jurisdiction that was exercisable by the queen in the islands so as to bring the case within the words of the 1843 act.<sup>33</sup> This was a fortuitous assumption and one that ignored the whole background of dispute about British foreign jurisdiction in such an area as Fiji. Nevertheless, it was the concession and admission necessary for the Foreign Office to proceed with the provision of consular powers by Order in Council. The lawyers recommended one restriction—that the powers be limited to offences committed within the limits of the Fiji islands. In all, this was a return to the position adopted by the law officers of 1866.

The Foreign Office was obviously pleased with the decision. The Colonial Office, however, hesitated and pointed out that the present legal advisers had overlooked the 1868 report where doubt had been thrown on the basis of "sufferance."<sup>34</sup> A conversation by notes ensued between Holland of the Colonial Office and Vivian of the Foreign Office. The latter argued somewhat in tones of desperation that something had to be done to enable the consul or some British authority to deal with crimes, offences, and disputes among the increasing number of British settlers in the islands.<sup>35</sup> Vivian argued in favor of proceeding by way of Order in Council rather than by imperial legislation, but Holland,

32. Granville to Kimberley, February 1, 1871, F.O. 58/124; see Legge, *Britain in Fiji*, pp. 119–21.

33. Collier, Coleridge, Twiss to Granville, February 17, 1871, F.O. 834/9.

34. Holland to Vivian, April 1, 1871, F.O. 58/124; also, minute, Holland, April 3, 1871, C.O. 201/567/3067.

35. Vivian to Holland, April 4, 1871, also, Holland to Vivian, April 5, 1871, F.O. 58/124.

although he agreed not to press the point, retained his doubts as to the legality of the procedure. This was a considerable strain upon the meaning of the Foreign Jurisdiction Act.

The Treasury issued its usual expressions of financial concern but the Foreign Office proceeded regardless.<sup>36</sup> It had the law officers approve the form of the draft order which then received royal sanction.<sup>37</sup> But here the matter ended because in the meantime a new government had been established in Fiji claiming international recognition. This was a government organized by some white settlers in cooperation with chief Cakobau, and during the year it promulgated a constitution on the Hawaiian model with the chief named as constitutional king. The question facing the Foreign Office was whether official recognition could be given to this new government. Not all groups in Fiji consented to Cakobau's move, and legal difficulties arose about the status and allegiance of British subjects involved in the formation of the new government.<sup>38</sup> The question was not satisfactorily answered although the Colonial Secretary considered that it could be dealt with as a *de facto* government. The issue of the new order was not proceeded with because attention was now directed to the possibility of the new government concluding arrangements with Britain conferring jurisdiction on the queen.

Once again the Foreign Office had drawn a blank, and on the very moment of seeming success. To the Pacific advisers in the office the matter was becoming one of desperation. It was not only the situation in the Fiji islands but also problems throughout the whole South Pacific—problems of lawlessness and kidnapping, problems of consular power. Every step taken, every different approach had led to new problems, new delays, new

36. Treasury to Granville, February 2, 1871, F.O. 58/129, May 6, 1871, F.O. 58/124. There were also problems involving the consent of the Australian colonies, see Collier, Coleridge, Twiss to Granville, May 18, 1871, F.O. 834/9; Kimberley to Granville, June 17, 1871, C.O. 201/567/5459.

37. Collier, Coleridge, Twiss to Granville, June 30, 1871, F.O. 834/9; see Jean I. Brookes, *International Rivalry in the Pacific Islands, 1800-1875* (Berkeley: University of California Press, 1941), pp. 370-72; Legge, *Britain in Fiji*, pp. 120-21.

38. Legge, *Britain in Fiji*, pp. 78-85, Ward, *British Policy*, pp. 207-13; for legal problems, see Coleridge, Jessel, Twiss to Granville, January 11, 1872, and Coleridge, Jessel, Deane to Granville, June 14, 1872, F.O. 834/10.



frustrations. Although the basic problem was legal the lawyers had not been able to produce a satisfactory answer, sometimes being inconsistent, at other times too permissive and vague about legal rights and duties. However, the distress of the Foreign Office was minor when compared with that of the consul in Fiji as he confronted each new situation. During 1871 conditions throughout the South Pacific seemed to be worsening with violent crimes increasing; it was a similar case with kidnapping, and the violent boarding of ships.

In connection with the latter activity the Foreign Office turned again to the law officers in the hope of obtaining some suggestion as to a legal means of controlling the situation. A British ship, *Oriti*, had been violently boarded in a Fiji harbor by some people including British subjects.<sup>39</sup> The consul had found himself virtually powerless to deal with the situation. The plight of the consul attracted the sympathy of the law officers but no new answer was available to overcome the difficulty. All they could do was reemphasize the weakness of British authority in the area.<sup>40</sup>

Cases like the present are attended with great difficulty not only from the strange and lawless character of the traffic in Polynesian natives (called passengers) which gives rise to them, such traffic being in some cases little better than a modified Slave Trade; but from the absence of all legitimate and enforceable authority in the Consul.

He had no real authority and could interfere only with whatever weight his position and personal character might give him. Again the law officers, either oblivious of or disagreeing with contrary legal opinions, urged that the consul be clothed with effective authority by Order in Council under the Foreign Jurisdiction Act.

The nature of the difficulty was further revealed later in the year. This was another case like the notorious one of the *Daphne*. The Queensland Act of 1868 concerning the transportation of Polynesian laborers stipulated a system of licensing for ships

39. March to Granville, March 27, 1871, in Granville to Collier, Coleridge, Twiss, May 5, 1871, F.O. 834/9.

40. Collier, Coleridge, Twiss to Granville, May 18, 1871, F.O. 834/9.



carrying islanders and prescribed standards of accommodation. But the act was hamstrung in operation because it could not be enforced outside Queensland. In 1871 a licensed ship, *Challenge*, was seized and prosecuted under the Queensland Act.<sup>41</sup> The ship had been engaged in transporting laborers to Fiji. The consul sent the case to Sydney for trial but the governor of the colony refused to authorize the trial to proceed in the Vice-Admiralty court because of the lack of jurisdiction. The ship was returned to the owners who held the captors responsible for the unlawful seizure and the resultant loss and damage caused through detention. The law officers had to agree with the action of the governor even though the consul in Fiji and the British captain had been correct in seizing the vessel and in endeavoring to obtain a conviction.<sup>42</sup> This time the lawyers did more than merely comment on the legal problem involved in the case. Taking a practical rather than a legal approach they sought to impress upon the Foreign Office the necessity of obtaining imperial legislation to overcome the mounting series of adverse legal decisions. Positive action was needed by the British Parliament "to protect the victims of kidnapping captains and to stop the growth of a Slave Trade in the Pacific, carried on chiefly by British settlers."

This action was taken early in 1872. By then main British interest in the Pacific had become centered on providing means to control kidnapping rather than the extension of consular power or of the Foreign Jurisdiction Act. Deficiencies in and the ineffectiveness of existing slave-trade acts indicated that a wider definition of offences was necessary to cover Pacific problems. But it took a shocking outrage in the islands to push London into definitely committing itself to legislation. This was the murder of Bishop Patteson, the missionary bishop of Melanesia. He was clubbed to death by natives under circumstances where kidnappers were implicated as being the *provocateurs*; the natives' action appeared as revenge for wrongs they had suffered from Europeans. A public outcry was raised in England, thereby creating the opportunity for the government to proceed finally

41. See Ward, *British Policy*, pp. 222-24.

42. Collier, Coleridge, Twiss to Granville, October 31, 1871, F.O. 834/9.

with legislation.<sup>43</sup> The bishop was a friend of the Prime Minister and the combination of parliamentary, press, and public indignation made Treasury protests of economy ring hollow.<sup>44</sup> The intention of the Colonial Office was to legislate for the regulation of the trade, not for its suppression; the latter was believed to be too difficult to enforce.<sup>45</sup> Accordingly, a license system was introduced for the transportation of natives in the Pacific not already within the British dominions nor within the jurisdiction of any civilized power. It was made an offence to enlist or decoy a native without his consent and the accused could be tried in the supreme courts of the Australian colonies. Provision was made for the seizure of a ship suspected of transporting such natives. At the same time the legislation was restricted to British offenders.<sup>46</sup> The object was to bring all British vessels engaged in kidnapping within reach of British law. To be fully effective to check the trade similar legislation by the other Western powers interested in the Pacific was necessary.

In the House of Commons the bill attracted unfavorable comment on the grounds that it was not wide enough in jurisdiction and intent to deal effectively with the problem of kidnapping in the Pacific. Admiral Erskine who had sailed extensively in the area and was interested in native welfare complained that it would not afford sufficient protection for the poor people kidnapped and he wanted to extend the jurisdiction to stop the traffic completely.<sup>47</sup> The restriction to British subjects in itself meant great difficulties would arise in any attempt to suppress the trade. The government, however, proceeded with the more limited scope of the legislation and in June the Pacific Islands Protection Act was written into the statute-books.<sup>48</sup> The act was

43. For historical background see O. W. Parnaby, "Aspects of British Policy in the Pacific: The 1872 Pacific Islands Protection Act," *Historical Studies, Australia and New Zealand*, VIII (1957-59), 54-65.

44. Knatchbull-Hugessen, February 15, 1872, 3 *Parl. Deb.*, CCIX (1872), 522; Kimberley, May 3, 1872, 3 *Parl. Deb.*, CCXI (1872), 185.

45. Memorandum for Cabinet, "Abuses connected with Polynesian immigration," Dealtry, January 29, 1872, P.R.O. 30/29/69 Granville MSS.

46. Kimberley to Granville, February 4, 1872, P.R.O. 30/29/25A Granville MSS.

47. Erskine, March 7, 1872, 3 *Parl. Deb.*, CCIX (1872), 1615; April 22, 1872, 3 *Parl. Deb.*, CCX (1872), 1665.

48. 35 & 36 Vict., c.19.

primarily legal in the sense that increased judicial facilities were provided for the control of the labor trade; but the jurisdictional question of control over islanders and foreigners was still basically untouched.

The act also did not settle any questions concerning the acquisition of jurisdiction in Fiji or the existence of a government there qualified to negotiate with the British government. These two problems were ultimately solved in 1874 by the act of annexation and as a result full jurisdiction was assumed over all persons in those islands. Even so this action did not supply an answer to the general theoretical and practical problem of British jurisdiction elsewhere in the Pacific where neither British nor other European sovereignty was established; British jurisdiction there appeared negative in the case of natives and foreigners and unworkable in the case of British subjects. The one obvious legal advance that arose through the annexation of Fiji was the creation of a court at Fiji; this could be used as a base for judicial facilities if British jurisdiction were somehow to be extended in the Pacific.

The decision to annex was made in the light of a review in 1873 of all the jurisdictional options open to the British authorities. But the decision to take action was determined partly by events during 1873 when it became more urgent from the conditions of anarchy and lawlessness that the British government must settle upon some constructive policy to protect its interests and those of British subjects there.<sup>49</sup> Apart from annexation the Colonial Office considered three possibilities, all of which pointed to the need to establish an adequate jurisdiction in the Pacific.

The first alternative was to invest the British consul with magisterial powers over British subjects who settled there. This was a continuation of the line of thought investigated in the 1860s. Edward March, now a retired British consul for Fiji, urged in 1873 that a British consul-general be appointed with full jurisdiction (including magisterial powers) over British sub-

49. Kimberley to Goodenough and Layard, August 14, 1873, C.O. 881/3; for background, see Ethel Drus, "The Colonial Office and the Annexation of Fiji," *Transactions of the Royal Historical Society*, 4th ser. XXXII (1950), 87-110.

jects in the Fijis, the Tonga islands, the New Hebrides, and such other places as they resorted to for labor or trading purposes, unless the distance was too great to make action by the consul possible.<sup>50</sup> If such a person was given enough authority and assistance—vice-consuls, police, gaol, and a schooner—law and order in the South Pacific could be maintained. This proposal could be brought into operation if there did not exist a government capable of controlling the residents within its limits.<sup>51</sup> But the Colonial Office feared that practical problems would arise in working out the consul's scheme. Furthermore there was no indication that the Fijian government would agree; the problem of foreigners would remain unaltered; and possibly chaos was becoming so regular that British subjects themselves would not submit to an increase of consular authority. This proposition seemed no nearer to success than when it had been canvassed by the Foreign Office the previous decade.

A second alternative was to give actual legal recognition to the government already established in the islands. The British government had already settled upon a policy of recognizing it as a *de facto* government but had not given it *de jure* recognition.<sup>52</sup> But even if full recognition were given, there was no assurance that the government would be able to control the residents.

A third alternative was to establish a protectorate. This proposition had been discussed a number of times in the early 1870s. Lord Kimberley, in reviewing proposals for Fiji in 1871, stuck by the government decision not to extend British sovereignty over the islands and then looked at the vagaries of a protectorate.<sup>53</sup> It was not clear to him what the concept intended but in any case it seemed open to objection. Britain's responsibility would not be lessened but its authority to handle problems would be

50. Memorandum, March, May 7, 1873, C.O. 881/3.

51. Kimberley to Goodenough and Layard, August 14, 1873, C.O. 881/3.

52. For example, see Coleridge, Jessel, Deane to Granville, July 18, 1873, F.O. 834/10.

53. Kimberley to Canterbury, March 16, 1871, "Correspondence . . . Affording Protection to British Subjects Resident in those Islands," H. of C. No. 435, p. 58, *P.P.* 1871, XLVII.



weakened; uncertainty would surely follow and probably in the end Britain would find it necessary to annex under unfavorable circumstances. Again, in 1872, a motion was introduced in the House of Commons, that a British protectorate be established in Fiji, with the purpose of controlling the labor trade.<sup>54</sup> The government set its mind against either protection or annexation although if any step was to be taken the latter seemed preferable. Now, in 1873, the same official opposition to a protectorate persisted. The Colonial Office dismissed the idea quickly.<sup>55</sup> Although no attempt was made to spell out the nature of a protectorate or the duties involved in it obvious objections were seen to arise—precisely because the responsibilities of protection were assumed to be vague and undefined while the powers to deal with the situation were assumed to be limited. The reasoning was circuitous and reflected a lack of interest in the concept—an unfortunate approach at a time when British policy could have profited from a clear and rational definition of protection.

The remaining solution was to assume territorial sovereignty over the islands. Since 1870 there had been a rising interest, not only in the Australasian colonies, but also in the British Parliament in favor of annexation. The continuing anarchy, the need to provide a sound and efficient administration and system of justice for British settlers resident in the islands, the need to protect their lives, property, and capital investments, all these factors contributed in the swing towards approving the step of annexation. So in October 1874 a deed of cession was signed by the chiefs transferring the sovereignty of the Fiji islands to Great Britain.<sup>56</sup>

This step did nothing to solve the problem of jurisdiction and control in the rest of the South Pacific, a vast area with numerous islands within 2,000 miles of the coasts of Australia and New Zealand. Apart from Fiji and Tahiti, there was already considerable European infiltration in some of the larger island groups

54. McArthur, June 25, 1872, 3 *Parl. Deb.*, CCXII (1872), 192.

55. Kimberley to Goodenough and Layard, August 14, 1873, C.O. 881/3.

56. For background on the steps leading up to annexation see Morrell, *Britain in Pacific*, pp. 154-67.



like Tonga, Samoa, the New Hebrides, and the Solomon islands. In the Colonial Office it was considered that the newly created post of governor of Fiji might be conferred with chief consular power for the Pacific; the governor might control local consuls scattered throughout the islands.<sup>57</sup> In this manner he could exercise authority outside the territorial limits of the Fiji islands while using the judicial facilities available there; certainly it would bring nearer the objective of control over British, if not over foreign, subjects. A precedent already existed in the case of the governor of Labuan acting in a consular capacity in Borneo. But the Foreign Office thought little of a scheme which involved a duality of allegiance and of duties. Would the governor-consul be responsible to both the Colonial Office and the Foreign Office? The traditional jealousy of one department in Whitehall towards another was revived. Lord Tenterden, an under-secretary at the Foreign Office, could see no necessity for the double appointment; the governor could quite easily and satisfactorily correspond with the consuls and advise them on colonial or labor problems.<sup>58</sup> The Foreign Office was more interested in expanding consular services in the area than in considering a proposal that would involve a surrender of some of its authority to the Colonial Office. Yet, from an overall point of view, the Foreign Office approach was narrow and short-sighted; the continuing problem of the labor-traffic in the 1860s and 1870s indicated that a strong and centralized system of control was more likely to succeed than a divided operation.

The clash in approaches was resolved in a compromise after two conferences between both departments.<sup>59</sup> The solution envisaged that the governor would be given the necessary authority to handle labor matters outside Fiji without really infringing the principle of allegiance to a single authority. He was to be appointed a high (or special) commissioner for West-

57. Carnarvon to Derby, January 12, 1875, F.O. 58/148.

58. Minutes, Wylde, February 4, 1875, Tenterden, February 9, 1875, Lister, February 10, 1875, Derby, February 26, 1875, F.O. 58/148.

59. Minutes, Bourke, March 6, 1875, F.O. 58/148; Herbert to Malcolm, March 5, 1875, C.O. 83/8/2461. Bourke and Wylde represented the Foreign Office, Herbert, the Colonial Office.

ern Polynesia, not consul general. This would authorize him to act in cases where British subjects were involved, but the Foreign Office insisted that he was not to interfere with foreigners or with ships bearing a foreign flag (that is, of a recognized civilized power). The Foreign Office agreed to station a consul at New Caledonia (or anywhere suitable) and it was to him that the high commissioner had to remit all foreign cases.

The Colonial Office was somewhat disappointed with the limitations insisted upon by the Foreign Office in working out the compromise. William Malcolm, an assistant under-secretary, responsible for Pacific affairs, hoped that the arrangement would not lead to a claim to a protectorate over the islands of western Polynesia.<sup>60</sup> Herbert saw the refusal of the Foreign Office to give the governor of Fiji full consular powers as a mistake seriously affecting the effectiveness of any labor-traffic legislation in the Pacific.<sup>61</sup> That problem required cooperation, not independence, on the part of both departments. He wanted all aspects of labor control, whether within or without Fiji, to be in the hands of one man. Lord Carnarvon agreed with Herbert.

The powers of the high commissioner were to be conferred by Order in Council under the Foreign Jurisdiction Act and accordingly the Colonial Office began to settle the amount of jurisdiction he could use. The intention was to give him the largest possible powers to deal with British subjects in the Pacific—whether they were involved in lawlessness and outrages generally, or the labor traffic specifically. Although islands within the possession of civilized powers, like French Tahiti and New Caledonia, were excluded along with Fiji itself, British subjects elsewhere in the Pacific were now brought within the scope of British jurisdiction. The Porte Order in Council of 1873 offered a model to follow of the nature and extent of civil and criminal jurisdiction that could be exercised.

A theoretical difficulty still remained. A basic assumption upon

60. Malcolm, see Appendix; minute, Malcolm, March 8, 1875, C.O. 83/8/2461.

61. Herbert, see Appendix; minutes, Herbert, March 14, 1875, Carnarvon, March 15, 1875, C.O. 83/8/2772; also, Derby to Carnarvon, March 11, 1875, F.O. 58/148.

which the Foreign Jurisdiction Act of 1843 rested was the existence of a civilized foreign power with whom Britain could deal. That power might conclude a treaty sanctioning the exercise of British jurisdiction over British subjects within its dominions; at the least, there needed to exist some kind of recognizable foreign government which through its actions or lack of actions might be taken to consent by acquiescence or sufferance to the exercise of British foreign jurisdiction. Pacific islands hardly fitted this condition; indeed it was the problem of Fiji in the 1860s resurrected. Could any of the native groups be deemed competent to comprehend or capable of being bound by the terms of a treaty? Who could be considered paramount when on an island there might be a number of rival chiefs, each hostile to the other? <sup>62</sup>

To overcome these problems the Colonial Office advanced the presumption that the British Parliament was competent to confer upon the queen a jurisdiction to be exercised over British subjects in savage or uncivilized countries where the consent of a recognized ruling power might be difficult, if not impossible, to obtain. In such places it would not be necessary to decide whether a local chief had sufficient sovereignty to make the usual grant by treaty. Instead it was reasoned that wherever the queen could provide a competent court without interfering with any other power she could be empowered to bring her subjects to trial and to settle their civil disputes in that court. This presumption went further than the 1828 act concerning the trial of British subjects in the Pacific and stretched significantly the scope of the Foreign Jurisdiction Act of 1843. The proposal contained a desirable and convenient assumption of jurisdiction that would facilitate judicial operations. It would overcome the odd and iniquitous practice that was developing as a result of legal advice whereby the British government was competent to use extraterritorial powers to create a legal structure and courts for British subjects in civilized countries yet not when those subjects were in savage or uncivilized countries.

62. See Carnarvon to Baggallay, Holker, Deane, March 30, 1875, C.O. 83/8/3433.

The law officers were asked to give a speedy report on this innovation; and after ten days they did.<sup>63</sup> In two sentences they endorsed the Colonial Office suggestion. They did not go into the intricacies of the question or comment upon the presumption of legislative competence made by the Colonial Office. The cause of the urgency in reply was the passage at that time of a bill in the House of Lords providing for the extension of the provisions of the 1872 Pacific Islanders Protection Act. The intention of the bill was to make more effective the repression of atrocities and the regulation of the labor trade. Again, like the earlier act, the principle was regulation rather than suppression of the trade.<sup>64</sup> The measure had already been considered and approved in draft by the Colonial Office, the Foreign Office, the Admiralty, the Board of Trade, and the lord chancellor.<sup>65</sup> To Herbert the time seemed opportune to produce an amendment to the bill providing for the creation of the office of high commissioner with a wide authority to exercise jurisdiction.<sup>66</sup>

When the amendment to create the new post was introduced in the House of Lords it received the endorsement not only of Lord Carnarvon, the colonial secretary, but also of Lord Kimberley, the previous Liberal colonial secretary.<sup>67</sup> The latter agreed that it was necessary to create a sufficient power of control over British subjects; otherwise the conditions of anarchy such as had grown up earlier in the Fiji islands would be likely to occur all over the Pacific. The amendment was accepted without dissent and the bill passed through both Houses with no trouble in mid-1875.<sup>68</sup>

At last the framework for an effective system of jurisdiction and control had been established in the Pacific islands. The office of high commissioner was to be created with jurisdiction over British subjects and he would have authority to make regulations for the government of those people and to punish them

63. Baggeallay, Holker, Deane to Carnarvon, April 10, 1875, C.O. 83/8/3970.

64. See Carnarvon, March 8, 1875, 3 *Parl. Deb.*, CCXXII (1875), 1857.

65. Carnarvon to Cairns, March 9, 1875, P.R.O. 30/6/6, Carnarvon MSS.

66. Minute, Herbert, April 10, 1875, C.O. 83/8/3970.

67. Carnarvon, Kimberley, May 4, 1875, 3 *Parl. Deb.*, CCXXIV (1875), 2-3.

68. Pacific Islanders Protection Act, 1875, 38 & 39 Vict., c.51, especially clause 6.



for breach of such regulations. More complete judicial facilities could be set up. A court of justice for British subjects with civil, criminal, and Admiralty jurisdiction could be established; also, the law officers approved an amendment extending the jurisdiction of an existing British court of justice, for example, the Supreme Court of Fiji, over the islands and places to be brought within the high commissioner's jurisdiction.<sup>69</sup> In addition, provision was made for the exercise of more complete powers of arrest, detention, and punishment.

Not all doubts about Pacific problems were yet put at rest. The Foreign Office wondered what the eventual consequences of the Colonial Office device might be. Although the act included a saving clause as to the rights of native tribes and specifically denied that Britain was laying claim or title to dominion or sovereignty to any of the islands or places in the Pacific, it seemed likely that other European powers would take the creation of the office of high commissioner as the first step towards annexation.<sup>70</sup> Such a presumption, however, was somewhat unwarranted, given the state of mind of British officialdom towards responsibility in the wide reaches of the Pacific. As Lister, an assistant under-secretary in the Foreign Office correctly mused, the Colonial Office would not intend annexation and the Foreign Office would not "for some years be able honestly to repudiate" a nonannexationist policy. And in the Colonial Office there was satisfaction about the course of Pacific events. The problem of jurisdiction which had been troubling administrators in Whitehall since the late 1850s now appeared to be settled by means of a clever but simple legal device—using the legislative competence of Parliament to create a jurisdiction where no other competent authority could do so. In this manner extritorial jurisdiction could be not only exercised but even created; and consequently it would not be necessary to resort to annexation or the more shadowy device of protection.

69. Baggallay, Holker, Deane to Carnarvon, April 29, 1875, C.O. 83/8/3970; Carnarvon to Baggallay, April 27, 1875, Baggallay to Carnarvon, April 28, 1875, P.R.O. 30/6/16, Carnarvon MSS.

70. Minutes, Wylde, Lister, *ca.* 25 March, 1875, F.O. 58/148.



As with any piece of foreign jurisdiction legislation an Order in Council was necessary to give teeth to the act. The latter was merely an enabling and authorizing device. In the Pacific case there was a delay of two years before the order was issued. This slowness arose out of drafting problems and disagreements between the Colonial Office and the Foreign Office; both departments were plagued by legal complications, some old, some new, as to the powers that might be bestowed on the high commissioner. The basis of the new order was to be the draft prepared in the Foreign Office in 1871. But the creation of post of high commissioner involved so many alterations to the original scheme that it became necessary to recast the draft. Herbert also looked closely at 1873 Order in Council for the Porte with the intention of using large parts of it, especially for the constitution and the procedure of the high commissioner's court.<sup>71</sup> The order was to cover two main concerns. Firstly, the executive functions of the high commissioner had to be outlined, and this included the appointment of deputy commissioners and the making of rules and regulations for the maintenance of peace, order, and good government among British subjects in the area. Secondly, a high commissioner's court was to be created with extensive civil, criminal, and Admiralty jurisdiction. In addition, a system of appeal, having recourse to the Supreme Court of Fiji, was desirable.<sup>72</sup>

Reilly attended to the preparation of the draft order, under instructions from the Colonial Office and with the assistance of Pouncefote. The latter was still hesitant about the basis of jurisdiction that Her Majesty had assumed in the Pacific and he wished to clear up all possible legal doubts and difficulties on this point.<sup>73</sup> He made a full review of the jurisdictional situation in the Pacific starting with the general principle of law enunci-

71. Minutes and notes on draft order, Herbert, *ca.* April 5, 1875, C.O. 83/8/2461.

72. For criticisms of the emphasis that the order put on legal rather than on executive functions, see Morrell, *Britain in Pacific*, pp. 185-86 and Ward, *British Policy*, pp. 273-74.

73. (Copy) "Memorandum on Her Majesty's jurisdiction in Western Polynesia," Pouncefote, n.d. (*ca.* early 1876), F.O. 97/497.

ated in the *Laconia* case of 1862.<sup>74</sup> This was a Privy Council report to the effect that no state could claim jurisdiction of any kind within the territorial limits of another independent state. He examined the exceptions to this basic rule and noted the operation of the Foreign Jurisdiction Act and the Pacific Islanders Protection Act of 1875. Pauncefoot saw the desirability of applying to the Pacific the former act since it readily provided a whole framework for the exercise of foreign jurisdiction. So he wanted to ensure that the new Order in Council would depend not only upon the Pacific Islanders Protection Act but also the Foreign Jurisdiction Act; this would allow administrators to take advantage of the provisions of the latter act concerning matters like deportation, the transmission of convicted persons for imprisonment, and appeals. Previously all attempts to have the Foreign Jurisdiction Act apply in the Pacific failed because of the difficulty of establishing the origin of jurisdiction (if any). It was clearly stated that an Order in Council could issue only if the jurisdiction had been obtained "by treaty, capitulation, grant, usage, sufferance, and other lawful means." The same objections still pertained as to the obtaining of jurisdiction by the first five means. Pauncefoot now argued for the existence of jurisdiction acquired "by other lawful means." For this, he relied upon the 1875 report of the law officers and the actual Pacific Islanders Protection Act of 1875; this statute itself created a jurisdiction "by other lawful means." Accordingly in the Order in Council it was recited that the power possessed by Her Majesty was exercised under the Pacific Islanders Protection Acts of 1872 and 1875 and the Foreign Jurisdiction Acts of 1843-1875.

Early in 1877 the law officers considered the final draft and made a number of technical, legal objections.<sup>75</sup> One related to a clause which allowed the operation of a procedure unknown to English law. Furthermore, a number of the provisions appeared extremely arbitrary while others introduced "novel principles of

74. *Papayanni v. The Russian Steam Ship Navigation and Trading Co. (The Laconia)*, (1862), 2 Moore's Privy Council, N. S., 161.

75. Holker, Giffard, Deane to Derby, January 3, 1877, F.O. 834/12,

procedure repugnant to British law"; sections concerning deportation and interrogation came under criticism. But the lawyers did acknowledge that the "extraordinary character of the provisions" might be justified in view of the difficult conditions that existed in the Pacific. A third objection was raised pursuant to a recent decision, the *Franconia* case, where doubt had been thrown upon the validity of British legislative power to control criminal acts within three miles of the coastline.<sup>76</sup>

Although accepting that some of the provisions were arbitrary, the Colonial Office was inclined to ignore these legal objections.<sup>77</sup> So, Herbert and Malcolm had two conferences with Reilly on the matter. He disagreed with the law officers and sought to justify the charge of arbitrariness.<sup>78</sup> The deportation power was similar to the one approved in the 1873 Order in Council for the Ottoman dominions; the interrogation power was necessary because difficulties might arise in trying to administer an oath locally. Reilly considered no changes as suggested by the law officers were necessary; these were largely policy matters determined by local facts. Herbert was willing to follow Reilly although to cover the situation it was considered wise to advise the high commissioner that he should exercise "the large and unusual powers" with the greatest caution.

The Foreign Office was not convinced by this defensive stand and sought a further legal opinion. The lawyers stuck by their decision although still assenting to the draft order.<sup>79</sup> An impasse was reached. The Foreign Office was not inclined to agree with the Colonial Office and throw over the lawyers' opinion as "peculiar."<sup>80</sup> The only course left open was to refer the matter to the lord chancellor. In this reference the Colonial Office ensured that the special circumstances of the Pacific islands were highlighted. Lord Carnarvon pointed out that it was undesirable to

76. *R. v. Keyn* (the *Franconia* case), (18-6) 2 Ex.D.63.

77. Minute, Malcolm, January 18, 1877, C.O. 83/15/658.

78. Reilly to Carnarvon, January 26, 1877, minute, Herbert, January 27, 1877, C.O. 83/15/1017.

79. Holker, Giffard, Deane to Derby, March 16, 1877, F.O. 834/12.

80. Minute, Herbert, April 2, 1877, C.O. 83/15/3434.

adhere closely in all cases to procedures which were more suitable to civilized countries.<sup>81</sup> Accordingly, a power of interrogation, even though it might be arbitrary, was seen as a useful, if not essential, aspect of the exercise of effective jurisdiction. The lord chancellor was reminded of the great practical and local importance of the issue of the order.

The lord chancellor answered in rather practical terms.<sup>82</sup> He did not agree with the law officers as to their interpretation of the *Franconia* case and the extent of British jurisdiction below the low-water mark; he had no doubt that legislative power existed for the purpose of repressing criminal acts within the three mile limit round the coasts. At the same time he considered that the scope of the order was too wide in that it could catch offenders outside the Pacific area and yet subject them to its arbitrary procedures.

This was a compromise decision and to avoid further delay and inconvenience the Colonial Office decided to accept the result. Herbert saw it as a "sacrifice of perfection" but the alternative was "interminable delays."<sup>83</sup> It was agreed to limit the jurisdiction of the high commissioner's court to the high seas of the Pacific and Indian oceans and adjacent seas. But even so all legal objections were not laid at rest. Now the Foreign Office drew attention to the lack of juries.<sup>84</sup> Herbert and Carnarvon "feared" that once again they would have to call upon the lord chancellor. Fortunately, precedent already existed in the case of the Jamaica District Courts. The lord chancellor proved to be conciliatory and helpful: "I do not think that it is essential to the administration of criminal justice in all circumstances that there should be a jury. . . ." <sup>85</sup> There already existed Orders in Council under the Foreign Jurisdiction Acts where this was the case. But where grave offences were committed at sea at a great distance from western Pacific islands he urged that trials should

81. Carnarvon to Cairns, April 12, 1877, C.O. 83/15/3434; Carnarvon to Cairns, April 9, 1877, P.R.O. 30/6/6, Carnarvon MSS.

82. Cairns to Carnarvon, May 3, 1877, C.O. 18/187/2211.

83. Minute, Herbert, June 5, 1877, C.O. 83/15/5328.

84. Derby to Carnarvon, July 12, 1877, C.O. 83/15/8561.

85. Cairns to Carnarvon, August 4, 1877, C.O. 83/15/9557.



be held within some jurisdiction where they could be conducted in the ordinary course.

This settled all the legal objections and the Colonial Office proceeded to issue the Order in Council in August 1877.<sup>86</sup> It had taken over two years to implement the provisions of the Pacific Islanders Protection Act of 1875—to define the powers of the high commissioner and to create the judicial machinery to be used to maintain conditions of law and order among British subjects in the western Pacific. This delay had arisen mainly over legal technicalities but their nature was not such as to raise again doubts and questions about the basis of Britain's foreign jurisdiction; indeed, that matter, being now established by parliamentary enactment, was not raised again.

The order was wide in geographical scope, listing the islands of the western Pacific and including "all other islands in the Western Pacific Ocean not being within the limits of the colonies of Fiji, Queensland, or New South Wales, and not being within the jurisdiction of any civilized Power." It applied to British subjects or British vessels. The position of high commissioner was authorized, along with the appointment of deputy commissioners, judicial commissioners, and a high commissioner's court. The high commissioner might exclude or remove from the islands for two years a British subject who was disaffected to British authority, or who already had committed or was about to commit an offence against the Pacific Islanders Protection Acts, or who was generally dangerous to peace and good order. The high commissioner might also restrain the actions of a person who was about to breach the public peace or to commit an offence against the Pacific Islanders Protection Acts; if such person failed to give security when so required he could be deported from the island. Also, an accused person could be interrogated without going under oath.

Pauncefote was pleased with the order. During the drafting

86. See Western Pacific Order in Council, August 13, 1877; for background to the order, see W. D. McIntyre, "Disraeli's Colonial Policy: The Creation of the Western Pacific High Commission, 1874-1877," *Historical Studies, Australia and New Zealand*, IX (1960), 279-94.



stages he complimented its usefulness as "a precedent in places where a very simple system of judicial procedure is required and is to be administered by non-professional persons."<sup>87</sup> Obviously, a simple procedure was needed in a situation where people of different civilizations were involved. Furthermore, most of the people involved in executing the system of justice were administrators or naval personnel and not lawyers. The important exception was the chief justice of the Supreme Court of Fiji, who it was intended should be the chief judicial commissioner in the high commissioner's court.

Pauncefote's pleasure was not reciprocated by Sir Arthur Gordon, governor of Fiji. He was annoyed first of all by the delay in his appointment as high commissioner for the western Pacific. Then, soon after his appointment in November 1877, he began to discover holes in the scope of the order. He complained that he was endowed with ineffective jurisdiction.<sup>88</sup> It was his understanding that the 1875 act intended to endow the high commissioner with power to make regulations for the government of British subjects in the islands. This had been limited in the order to making regulations which would require British subjects to observe treaties entered into between British and native authorities or which would secure the maintenance of friendly relations between British subjects and local authorities. He was denied a general, administrative control over British subjects scattered throughout the islands. More important, the limitation meant that the high commissioner was not able to make regulations for the treatment of imported laborers in the service of British subjects on islands in the Pacific. And Gordon felt that such regulations were much needed—for example, in Samoa. The Protection Acts dealt with regulation of the voyage but assumed that when the natives were landed they would be under the protection of some local law, either British or French. This lack of effectiveness was further compounded by the fact that the high

87. Minute, Pauncefote, June 14, 1876, C.O. 83/12/12036.

88. Gordon to Hicks Beach, ca. December 27, 1878, C.O. 225/1/16723; for Gordon's role in the western Pacific, see J. K. Chapman, *The Career of Arthur Hamilton Gordon, First Lord Stanmore, 1829-1912* (Toronto: University of Toronto Press, 1964), chap. vii.

commissioner was not empowered to make treaties and engagements with native chiefs and tribes. The Colonial Office hoped to remedy this defect but the Foreign Office was unwilling for such power to pass out of its control to the high commissioner.<sup>89</sup>

Gordon also pointed out other limitations in the power of the high commissioner to exercise criminal jurisdiction. For example, occasions arose when the high commissioner needed to be invested with the whole criminal jurisdiction already vested in judicial commissioners under the existing order.<sup>90</sup> These were emergency occasions when it was desirable to empower the high commissioner to deal with a case on the spot. As the high commissioner was doing the rounds of the remote islands in the Pacific he would come across cases involving serious crimes; the witnesses were available, yet under the order the case would have to be sent elsewhere, for example, from the Solomon islands to the judicial commissioner at Fiji. This raised immediate difficulties which led to a frustration of justice. Native witnesses objected strongly to being shipped off to Fiji, fearing that they might be detained for labor; and witnesses, being from the crew of a foreign ship, were disinclined to dally for the sake of British justice or to divert their passage to a British court.

The Colonial Office favored this extension of the high commissioner's criminal jurisdiction and found precedents in the case of small colonies like Labuan, the Falkland Islands, and St. Helena where full judicial authority was vested in a governor, not being a lawyer.<sup>91</sup> Reilly likewise approved the scheme although he added checks on the exercise of the extended power.<sup>92</sup> But the Foreign Office was not satisfied on this point. Pauncefote argued that the colonial precedents were hardly analogous;<sup>93</sup> in the colonies there were various safeguards which did not exist in the barbarous islands of the Pacific. The effect of the extended

89. Salisbury to Hicks Beach, February 4, 1879, Hicks Beach to Salisbury, March 24, 1879, C.O. 225/4/4091.

90. Gordon to Hicks Beach, *ca.* December 27, 1878, C.O. 225/1/16723.

91. Minute, Herbert, January 23, 1879, C.O. 225/1/16723.

92. Memorandum, Reilly, May 29, 1879, C.O. 881/5.

93. Pauncefote to Bramston, May 31, 1879, private, C.O. 225/1/16938; also Salisbury to Hicks Beach, April 17, 1879, C.O. 225/4/6162.

powers would be that the high commissioner was prosecutor and judge at the same time. This was another matter for the law officers.

In the case it presented to the law officers the Colonial Office emphasized the difficulty of operating a system of law and order in an area like the South Pacific.<sup>94</sup> Gordon's request was recommended on the ground that it was preferable to confer special powers for exceptional cases rather than to risk a failure of justice in cases of extreme gravity. The law officers accepted the evidence of Gordon and the plea of the Colonial Office that the exceptional powers were justified.<sup>95</sup> Accordingly, they approved the whole of a draft Order in Council prepared by the Colonial Office to correct some of the shortcomings of the original order. This supplementary order issued in mid-1879.<sup>96</sup> The high commissioner was given extended regulation-making powers so far as concerned British subjects in the area and he also received extended judicial powers. The web of British jurisdiction was slowly being perfected in the Pacific.

The legislative solution adopted in the Pacific in the 1875 act was soon taken up in Africa. The stimulus for this extension of the scope of foreign jurisdiction legislation came from problems of British authority in the Congo region. This area had long been claimed by Portugal although it had done little to consolidate its claims. Europeans of all nationalities, including British, lived or operated in the area; some committed murders and atrocities, some held slaves. In 1877 a number of African slaves were drowned and some Europeans, including a British subject, Scott, were implicated.<sup>97</sup> The law officers confirmed the legal position that he could be tried under the English Criminal Law Consolidation Act of 1861; but such a course of action was prohibitive by virtue of the practical consideration that it was too difficult to produce witnesses or obtain sufficient evidence for a

94. Hicks Beach to Holker, Giffard, July 3 and 23, 1879, C.O. 225/4/10170.

95. Holker, Giffard to Hicks Beach, August 12, 1879, C.O. 225/4/12887.

96. Order in Council, August 14, 1879; another western Pacific Order in Council issued September 6, 1880 but it did not relate to problems of jurisdiction.

97. Memorandum, Pauncefote, May 16, 1877, F.O. 97/489.

conviction in England.<sup>98</sup> No British consular authority existed in the region; the nearest colonial court was in Lagos but the West African Settlements Act of 1871 did not apply in the Congo.

In effect, no satisfactory British jurisdiction existed in the area. No practicable means were available to bring a British transgressor to justice and such a situation provided good ammunition for a critical outcry in the House of Commons.<sup>99</sup> The Foreign Office had hoped to rely upon the law officers but the latter offered no comfort; because of practical difficulties and gaps in the law "no steps can be taken to bring Scott to justice." The law officers did not suggest the obvious answer—that the scope of the foreign jurisdiction legislation should be extended so that an area like the Congo could easily be brought within the range of British jurisdiction.

As it happened, Francis Reilly was at this time preparing for the Foreign Office a further Order in Council for China and Japan. It was a complicated matter involving an extension of jurisdiction there and it seemed that a supplemental Foreign Jurisdiction Act would be necessary to effect this purpose. Pauncefote took the initiative and decided to use the opportunity to include a provision to cover the Congo situation.<sup>100</sup> Pauncefote favored a statement that the queen would be empowered to provide for the administration of justice by Order in Council under the Foreign Jurisdiction Acts in any place out of the British dominions but not being within the jurisdiction of any civilized power. Here he was following the lead set in the Pacific Islanders Protection Act of 1875. Again, a simple method of obtaining jurisdiction was proposed so as to avoid the necessity of obtaining grants by treaties or otherwise. And again, the principle was being put up that a different standard might apply for less civilized areas of the world; the usual rules of international law governing the family of nations might be modified and watered down for people in those areas.

The advantage of bringing the Congo within the scope of the

98. Holker, Giffard, Deane to Derby, August 9, 1877, F.O. 97/489.

99. W. E. Forster, August 9, 1877, 3 *Parl. Deb.* CCXXXVI (1877), 678.

100. Pauncefote to Reilly, December 22, 1877, F.O. 97/489.



Foreign Jurisdiction Acts was that both minor and grave offences could be adequately covered. The former could be handled locally while the graver crimes could be sent to trial in the courts of the West African settlements. Reilly saw no objection to such a provision and included an appropriate clause in the draft bill.<sup>101</sup> Its object was to extend the Foreign Jurisdiction Acts to cases where there was no regular government from which the crown might obtain power and jurisdiction by treaty, cession, usage, sufferance, or other means as provided in the Foreign Jurisdiction Act of 1843. Although the law officers approved the move they raised as an alternative the suggestion that all the existing Foreign Jurisdiction Acts be repealed and a new, consolidated act be prepared containing all the existing and any new provisions that might be necessary to make effective the queen's jurisdiction in foreign areas.<sup>102</sup> Pauncefote vetoed this suggestion fearing parliamentary opposition and delays might arise if the existing enactments relating to foreign jurisdiction were again brought in a consolidated form to the notice of Parliament.<sup>103</sup> The immediate object in mind was an amending bill relating specially to Chinese problems. Reilly agreed with the Foreign Office that it was an inopportune moment to consider a consolidation; so the law officers' suggestion was ignored. Jenkyns set about the preparation of a short bill.<sup>104</sup>

As might be expected it was the Treasury that called a halt to the progress; the query was raised as to the amount of public money that would need to be expended in providing for the exercise of jurisdiction in uncivilized areas where there was no regular government.<sup>105</sup> In reply Pauncefote fell back upon the 1875 Pacific precedent.<sup>106</sup> Furthermore, he estimated that in actual operation only minimal, additional cost would arise since the object of the provision was to give judicial powers to consuls already established in uncivilized places. Their powers would

101. Memorandum, in Reilly to Pauncefote, January 17, 1878, F.O. 97/489.

102. Holker, Giffard, Deane to Salisbury, May 13, 1878, F.O. 17/796.

103. Minutes, Pauncefote, Salisbury, May 15, 1878, F.O. 17/796.

104. Reilly to Pauncefote, May 30, 1878, F.O. 17/796; Jenkyns, see Appendix.

105. Treasury to Salisbury, July 9, 1878, F.O. 17/797.

106. Minute, Pauncefote, July 10, 1878, F.O. 17/797.



now be extended so that they might operate with more judicial effectiveness in those places.

The bill passed through both Houses with no discussion.<sup>107</sup> The result was that a Pacific solution was applied to that other great expanse of the globe, Africa, where Britain had not yet satisfactorily worked out an answer to the problem of sovereignty and jurisdiction in less civilized areas. The act also sought to improve the administration of justice in foreign jurisdiction areas by enabling the queen to extend and adapt to foreign jurisdiction courts certain useful imperial acts. These included acts which had already been applied to colonial courts to facilitate the operation of justice—for example, as to the taking of evidence in courts within Her Majesty's dominions in respect of cases where foreign tribunals or foreign law were involved.<sup>108</sup> Such legislation had an obvious, immediate use in foreign jurisdiction areas.

By the mid-1870s it seemed that British policy-makers were becoming set upon devising a workable answer to foreign jurisdiction problems in Africa and the Pacific. The doubts and frustrations—the “stop-go” approach—that characterized the 1860s and the early 1870s seemed to be resolved by the bold but simple steps taken in 1875 for the Pacific and in 1878 in Africa for all foreign jurisdiction areas. By the latter date it had become necessary to define more clearly the nature and extent of extritorial rights that Britain could exercise in the semicivilized or uncivilized areas of Africa and the Pacific. Definition and theory were beginning to replace the earlier loose, fluid approach that had been adopted by the administrators in Whitehall. Beginning with the vague “protectorate” concept that had been invoked in the case of the Gold Coast since the 1840s the Colonial Office had evolved various legal ploys to extend British jurisdiction wherever necessary or convenient. It was a continuing problem for the British government to ensure that some form of control and jurisdiction could be provided in whatever remote area of

107. Foreign Jurisdiction Act, 1878, 41 & 42 Vict., c.67.

108. See Reilly to Pauncefote, March 2, 1878, F.O. 97/489; eleven acts were listed.

the globe British subjects were resorting to. In this regard, the basic intention of officialdom was that British subjects should be brought to justice for their misdoings rather than that they should be protected by English law against other people; it must not, however, be thought that the latter element was not also considered important.

In the case of West Africa the British web of jurisdiction was beginning to be spread over persons other than British subjects. This was true in some of the "protectorate" areas where the increasing contact between native and British groups made it feasible and sensible to extend British jurisdiction into native areas, especially if the natives were quite willing or even eager to accept it. But British jurisdiction was also broadening in another sense; it began to include administrative powers of a regulatory nature. And although as a strict matter of law these encroachments had a dubious legality, it was possible for British administrators, both on the spot and in London, to defend the action on the ground that the native peoples did not object to the extension. By a simple written device one could assert that jurisdiction obtained in this manner was done by "other lawful means." But a stronger justification could be put forward. Even though no direct grant might have been made by one sovereign power to another, such as would have been deemed desirable between two civilized nations, one could assume a sufferance on the part of the native chiefs and peoples sufficient to justify the exercise of British jurisdiction. In any case a further rationale for British extension could be secured on the assumption to be found in the thinking of most imperial officials that British jurisdiction and administration were desirable benefits of civilization to be offered if necessary, or if requested, to lesser developed areas of the world. Conditions of peace, order, and good government were necessary for the life of British subjects and desirable for the advancement of natives. How well these conditions were established, once London had decided to extend its influence, was affected by two major, internal considerations—one was the practical matter of cost, the sanction of the Treasury. The other was at the theoretical level; legal sanction was necessary. And it was the role of the legal answer to help fashion the decision

as to the kind of extension of British authority that could be made.

The same generalizations apply to the Pacific. There the major concern was the control of the labor traffic especially as carried on by British subjects. But the complicating factor in the Pacific was the legal problem of sovereignty. This problem could have been raised also in the African cases but generally was not. The usual approach was to make a full equation in status between a sovereign European state and the political units over which the relevant African kings and chiefs had control. But in the Pacific the question was clearly and directly posed: did there exist in the Pacific any power that was sufficiently competent to negotiate a transfer of jurisdiction? And since no protectorate type of situation had ever been created there, it was not so easy to assert that jurisdiction had been built up slowly and indirectly, by sufferance or other lawful means. The problem was finally solved in 1875 by the direct action of the British Parliament asserting its legislative sovereignty. Until then legal duality, indecision, and even ignorance had proved a source of great frustration and inconvenience to both the Colonial Office and the Foreign Office in their attempts to lay down foundations upon which conditions of law and order could be created in the Pacific. Through legislation a greater legal definition of jurisdiction and its acquisition was made. But it was only a small step; much more legal and practical thought needed to be given to the concepts of "sovereignty," "foreign jurisdiction," and "protectorate." But a beginning was made and it aided imperialistic urges. The British government had acted to allow a convenient, if limited, imperial expansion wherever circumstances required it.

The evidence relating to these developments in the Pacific and Africa in the late 1870s—the High Commissionership and the amended Foreign Jurisdiction Act—points towards the argument that the British government was prepared to be imperialistic and allow expansion; but this had to be done slowly and indirectly, and with a minimum of cost and inconvenience. Certainly the direction of the evidence is not definite and assured, and the lack of clarity might lead one to argue on the contrary that whatever expansion took place was accidental and unintended. At the

same time the point cannot be ignored that the government clearly adopted a policy creating machinery to allow further indirect expansion. The government, led by the Colonial Office and the Foreign Office, was ready to condone and endorse schemes which meant the assertion of more authority, control, and jurisdiction in less civilized areas. It would allow British influence to spread. Admittedly official policy tried wherever possible to avoid outright, direct annexation; but at the same time official policy did sponsor schemes to allow indirect expansion. Machinery was created which the government in Whitehall would not consciously use but which the man-on-the-spot, whether he be governor, soldier, trader, missionary, or adventurer could use for his own purposes. In doing so he was almost certain eventually to call in the assistance of the British government.

This official policy, aiding and abetting indirect expansion, arose rather obviously out of the cultural climate of the day. In a sense it was almost inevitable that official thinking should endorse a policy of indirect expansion on cultural grounds. The apparent superiority of the British system—certainly in technology and obvious materialistic welfare—naturally led imperial planners in London to think that British influence in the more primitive areas would increase and should be allowed to increase. Therefore, it was not unreasonable that the machinery to allow such an increase should be improved and adapted to suit differing conditions. So legal devices were arranged in London to aid and expedite the spread of British influence being carried out by men-on-the-spot. At the same time one must also insist upon the sure disinclination of the British government to take direct and positive steps—to avoid the annexation of these tropical and uncivilized areas—unless forced by necessity as a last measure. There was certainly an official policy of expansion, but with limitations; and legal devices fixing these limitations were being fashioned by the legal advisers in the Colonial Office and the Foreign Office, along with the assistance of the law officers of the crown.

*The 1880s: Greater Definition and More Problems*





## The Law Hardens

By 1878 the Colonial Office and the Foreign Office had shown themselves prepared to endorse policies of informal expansion into those parts of Africa and the Pacific not already under European control. The two departments had induced Parliament in 1875 and 1878 to allow the creation of jurisdiction in uncivilized regions and this could occur virtually at the behest of a local British official. It would happen in the name of law and order, and for the maintenance of peace, order, and good government among British subjects.

The law officers had generally taken a flexible—or perhaps more accurately indecisive—stand on the matter; overall they were more prepared to approve schemes of extended jurisdiction than they were to oppose it. Their stand was shaped most by their lack of understanding of the problem and the lack of a definite legal theory that could be applied to such extritorial matters. Given such deficiencies they not unnaturally took the easy approach, making few definitive statements and approving well-framed cases from the originating department. No constructive force of opposition existed to ruffle or detract from the complaisant attitude of the lawyers; so they drifted along with the flow of events.

A change came in 1879 and the easy spread of jurisdiction was halted. The law officers reviewing the general drift began to take a hard line defining more narrowly the limits of foreign jurisdiction and the methods of obtaining it. Indeed they were unwittingly throwing away the opportunities created in the 1875 and 1878 acts to facilitate a quick and ready extension of British foreign jurisdiction into less civilized areas. Just at the

moment when the gates were opening to a rush of British expansion points of opposition were raised; and they were mainly points of legal theory raised by the lawyers. Their opposition was first formulated in response to various schemes put up between 1879 and 1883 by the Colonial Office for the extension of jurisdiction over Pacific islanders. And soon the same legal considerations were being applied to Africa.

It was yet another case of Pacific lawlessness and violence that set off the legal rethinking. In 1878 Henry Townsend, a British subject of notorious reputation, was murdered by some natives of the island of Ugi in the Solomon Islands. Although Townsend's attitude towards the islanders had been provocative it was deemed necessary by the lieutenant of H.M. schooner *Beagle* that punishment be meted out to the native offenders and accordingly their village was destroyed.<sup>1</sup> This action by the navy was just one in a series where naval discretion had to fill the lack of judicial authority in the vast but poorly controlled expanses of the globe's oceans. But since a high commissioner had been appointed for the western Pacific the question was now posed as to the relationship between that officer and naval commanders; how much authority did the latter have to effect some measure of control in the area?<sup>2</sup>

The establishment of the western Pacific high commissioner greatly complicated legal relations between British subjects and Pacific islanders. It meant the introduction to the area of the refinements of a civilized system of justice; but the benefits of this were in one sense somewhat reduced since its scope was limited to British subjects while natives were outside its ambit. No means of control over native violence, either between natives themselves or between natives and Europeans, was provided under the new system. Consequently the former practices of control still applied. This was the system of "commodore justice"

1. See Gorrie to Hicks Beach, September 16, 1878, C.O. 225/1/15069; also Gorrie to Hicks Beach, January 8, 1879, C.O. 225/2/4245.

2. Deryck A. Scarr, *Fragments of Empire; a History of the Western Pacific High Commission, 1877-1914* (Canberra: Australian National University Press, 1967), pp. 36-52 has a good chapter on relations between the high commissioner and the Admiralty, 1877-81.

administered by the Royal Navy.<sup>3</sup> Before the intrusion of the high commissioner the navy possessed and operated the only kind of policing power in the Pacific. Obviously it was a rough and ready form of justice and of very dubious legality. A British offender might be carried elsewhere, for trial or deportation. A native might be summarily punished, even executed. Sometimes exemplary and retaliatory punitive action might be taken against the whole of a native group especially if the native offender (or offenders) could not be identified or isolated. The village of an erring native group might be bombarded and destroyed according to the precepts of the law of the strong. Naval justice, of necessity, was arbitrary, sporadic, and generally ineffective but it did provide a semblance of authority when no other existed.

The creation of the western Pacific high commissioner brought such naval action under legal review, both constitutional and criminal. Although he could not deal with natives themselves the high commissioner was charged to deal with British subjects who violated native persons or property. Consequently naval commanders (and crews) who took punitive action of their own accord against natives without observing the regular procedures and forms of British law were making themselves criminally liable for their actions. In addition legal definition had to be given to the boundaries of jurisdiction between the high commissioner and naval commanders.

In the *Beagle* case Gorrie, the chief justice of the Supreme Court of Fiji and at the time acting high commissioner, lamented that the situation in the Pacific was such that drastic action of the kind administered by the naval commander was necessary.<sup>4</sup> But he acknowledged that insurmountable legal problems existed through the failure to invest the high commissioner with the requisite jurisdiction. There was an urgent need to take some form of jurisdiction over the natives. This was necessary to teach them a higher respect for law and it could also help in decreasing the rising crime rate. This rise in native crime was attributed

3. Ward, *British Policy*, pp. 274-76.

4. Gorrie to Hicks Beach, September 16, 1878, C.O. 225/1/15069.

not so much to the natural proclivities of the islanders themselves as to the provocative action of whites. In devising a successful solution Gorrie warned against schemes tying down the hands of the local administrators. For this reason and even though he was a lawyer himself—a bad lawyer—he was suspicious of the

technical views of lawyers, and writers on law, who can only see what they have the faculty of seeing and speak according to the range of their knowledge and experience. . . . In spite of theories we are obliged from time to time to take the law into our own hands, and inflict necessary punishment.

One possible solution was to use the high commissioner's court and extend its Admiralty jurisdiction. Officers of the naval squadron should take part in it for the trial of crimes. Natives could be brought within Admiralty jurisdiction as communities beyond the pale of international law and having no regular government which could be appealed to for the purpose of punishing offenders. A similar use of Admiralty jurisdiction was made in the case of pirates. Gorrie was urging the British government to adopt a positive, innovatory plan to solve the Pacific problem. There were no precedents to follow.<sup>5</sup>

No authority will be found in treatises on International Law for an assumption of jurisdiction over the islanders of the South Seas who commit crimes, because on this point international law has to be made and it seems to fall upon us from the extent of our relations with the islanders to set an example which may be followed by other nations.

Gorrie was right that the law was silent on this matter. The only problem was that the government might not be prepared to make the policy-decision in favor of a more ambitious scheme of jurisdictional expansion.

The Colonial Office had its reservations about Gorrie—as a man, as a lawyer, and as an administrator. Although in his reports on this problem he had shown care and ability it was noted that he had a tendency to be “too eager to sail forth and redress wrongs through the Western Pacific.”<sup>6</sup> Sir Arthur Gordon, the

5. Gorrie to Hicks Beach, November 11, 1878, C.O. 225/1/874.

6. Minute, Herbert, January 24, 1879, C.O. 225/4/989; see Scarr, *Fragments of Empire*, p. 43, for criticisms of Gorrie.



high commissioner, at that time on leave in London, gave general support to Gorrie but did not press directly Gorrie's pleas for the assumption of greater jurisdiction over the natives.<sup>7</sup> Herbert, although agreeing that the suggestion was an important one, thought there would be a legal hitch; he doubted whether the law officers would advise the assumption of power to try natives under a form of Admiralty jurisdiction in the manner in which pirates could be tried.<sup>8</sup> And the colonial secretary, Sir Michael Hicks Beach, feared that Gorrie's suggestion amounted in practice to an assumption of sovereignty over the natives within the high commissioner's jurisdiction. He was opposed to any step involving the government in that manner but it was a question that he thought might be left to the lawyers.

The Colonial Office asked the lawyers a very open question—was the British government competent to confer upon a British court jurisdiction to try savages for offences against British subjects along the lines Gorrie suggested. The law officers answered decidedly no.<sup>9</sup> They restated the simple, basic principle governing foreign jurisdiction—*extra territorium ius dicenti impune non paretur*. The right to make laws affecting a person or to assert jurisdiction over anyone rested on two grounds—on a personal jurisdiction as in the case of the allegiance owed to the crown by British subjects over all the world, or from holding sovereignty over the territory concerned. The law officers were not prepared to look beyond that principle; they were not inclined to investigate the suggestion that new law needed to be made. In reply to Gorrie's proposal that jurisdiction over foreigners might be obtained by an Imperial Act or by Order in Council the lawyers expressed attitudes of shock. "Such an Act or Order could effect nothing, and we think would be a very mischievous example of a State attempting to legislate for those beyond its jurisdiction."

7. Gordon to Hicks Beach, January 21, 1879, C.O. 225/4/989.

8. Minutes, Herbert, December 4, 1878; Hicks Beach, December 8, 1879, C.O. 225/1/15069.

9. Hicks Beach to Holker, Giffard, January 4, 1879, C.O. 225/1/15069; Holker, Giffard to Hicks Beach, March 20, 1879, C.O. 225/4/4488. On background to the legal advisers, Holker, Giffard, and Deane, see Appendix.

This was a very precise and definite statement of the law, limiting the operation of any policy of informal expansion. Yet the same law officers had been involved in earlier reports on the extension of foreign jurisdiction. Holker and Deane (as queen's advocate) were concerned with the legal decision approving the Pacific Islanders Protection Act of 1875; Holker, Giffard, and Deane issued the 1877 report on the western Pacific Order in Council although then they expressed some reservations; the same three issued the 1878 decision on the new Foreign Jurisdiction Act. Now Holker and Giffard were setting a limit on any further extension of the methods of establishing British foreign jurisdiction. Yet this case could be regarded as a logical extension of the concessions to establishing British authority in native areas made in 1875, 1877, and 1878. In those three cases the extension was allowed so far as British subjects were involved in areas of less civilized people. The obtaining of jurisdiction in those areas over British subjects was greatly facilitated using the rationale that it was too difficult, if not impossible, to obtain an adequate, direct grant of jurisdiction from the native authorities. A special modification or partial relaxation of the necessity to obtain consent was made in the case of less civilized people. But the lawyers were not prepared to go further and assert that jurisdiction over the less civilized people themselves might be obtained in the same manner. Instead the lawyers relied upon the basic assertion of the law finding no distinction between European and less civilized groups. They were not yet prepared to adopt the idea that Western notions of sovereignty might not apply to the less civilized groups in the world. A partial modification affecting the conduct of Westerners in the area could be allowed and justified but not a total revision in the sense that native sovereignty and authority was of a lesser kind than that which existed in an independent state of Europe.

The upshot of the law officers' decision in 1879 was that no innovations, no new solutions would be offered for problems between natives and whites in the Pacific. The only course of action the lawyers could recommend was a continuation of the existing practice. Acts of violence or injury committed by savage

tribes were to be treated as acts of war and could be dealt with accordingly; naval commanders must continue to shell tribes and villages.

The Colonial Office was not surprised by the legal response. In any case the office had not been pressing Gorrie's proposal. Gordon accepted the law but pointed out how unreasonable it was in practice.<sup>10</sup> Obvious injustice arose if an act of violence or injury inflicted by a single savage, or perhaps two or three, was treated as an act of war on the part of the whole tribe with punishment meted out to them generally. Gordon made a counter-suggestion based upon his interpretation of a statement made by Attorney-General Holker during a debate on Cyprus in the House of Commons.<sup>11</sup> The debate concerned an agreement between Turkey and Britain as to an increase of the latter's powers in Cyprus. This was an assertion to the effect that, without any surrender of sovereignty actually being made, the right of exercising jurisdiction, and even of legislation, might be conceded to the sovereign of another state. Upon that principle Gordon argued that it would be easy to obtain conventions with various chiefs in the islands granting jurisdiction in respect of offences committed against British subjects.

So far as Hicks Beach was concerned, the matter was settled and he was not prepared to pursue the problem further. He squashed Gordon's suggestion on the ground that there was no reason why a savage tribe should not be as responsible for the acts of one of its members as a civilized community.<sup>12</sup> In one sense Hicks Beach was being unfair to Gordon. The intent of the latter in making his suggestion was to try to introduce in practice some degree of responsible control to the Pacific situation. Hicks Beach was thinking more at the theoretical level that all communities should be responsible for their actions and a different standard should not be adopted for different kinds of civilized communities. Hicks Beach commented tersely: "I think

10. Gordon to Hicks Beach, April 17, 1879, C.O. 225/4/6257.

11. Holker, March 24, 1879, 3 *Parl. Debs.*, CCXLIV (1879), 1572-76.

12. Minute, Hicks Beach, April 27, 1879, C.O. 225/4/6257.

Gordon may content himself with the Pacific, and leave Cyprus alone."

So the problem remained unsolved in the Pacific. Criticism could be made of the Colonial Office for its failure to be specific in its attitude towards the extent of British authority in native areas. This indecision and confusion existed from the very creation of the position of high commissioner in 1875. Gordon considered that the conduct of relations with the natives formed one of the principal objects of the office.<sup>13</sup> For this he relied upon the words of Lord Carnarvon who was colonial secretary at the time of Gordon's appointment: "Within the limits of the High Commissionership, as within the boundaries of a Colony, the authority of the officer holding such a commission from the Crown should be *sole and supreme*." Herbert agreed with Gordon about the original intention.<sup>14</sup> And in line with such a statement Gordon sought to make the naval commanders in the Pacific subject to consultation with him and to his general supervision. In the punishment of crimes naval officers should be subject to his directions and not act of their own accord. But the Admiralty and the local naval officers could not agree to this approach, mainly for practical reasons.<sup>15</sup> The officers, being the ones on the spot, were faced with the situation of acting immediately in punishment or ignoring the matter completely with the result that no punishment would be dealt out. There were very few occasions when it was either practical or convenient first to seek the high commissioner's opinion and then to carry it out. In nearly all cases the high commissioner was dependent upon the navy for any of his decisions to be carried out and accordingly it appeared unwise to deprive the naval officers of their powers to execute justice.

Gordon kept pressing for a finer definition of relations between himself as high commissioner and naval officers and in this he

13. Gordon to Hicks Beach, February 24, 1879, C.O. 225/4/3095; see also the view of Chief Justice Gorrie in Gorrie to Hicks Beach, May 26, 1879, C.O. 225/2/12478.

14. Minute, Herbert, January 15, 1880, C.O. 225/3/19614.

15. Admiralty to Hicks Beach, February 3, 1879, C.O. 225/3/1681.



was supported by Gorrie as acting high commissioner.<sup>16</sup> Between 1879 and 1881 protracted negotiations were conducted between the Colonial Office and the Admiralty on this point. Various proposals were considered and various instructions given. One possibility was for the commodore and the high commissioner to be the same person.<sup>17</sup> The Admiralty considered that the commodore was already sufficiently busy; in any case, if he assumed the high commissioner's powers he would still not be invested with legal power to deal with natives.<sup>18</sup> A council of war in which a quasi-judicial procedure could be used was mooted but the Admiralty thought it would lessen the sense of responsibility shown by its officers.<sup>19</sup> A third scheme proposed issuing new Rules of Court giving certain legal powers to naval officers.<sup>20</sup> The Colonial Office approved them as "a simplifying step in the right direction" but there were fears that they might be *ultra vires*. The law officers rejected the rules on the ground that they went quite beyond the rule-making power of the high commissioner and conferred "on naval officers an important and novel power."<sup>21</sup> A fourth proposal was to make at least some of the naval officers deputy commissioners.<sup>22</sup> They would then be under the authority of the high commissioner and similarly their vessels on local duty would be under his control. Although the initiative came from Gordon the Admiralty took up the idea in 1881 and urged that fuller powers be given to naval officers to deal with outrages committed by white men on natives.<sup>23</sup> Agreement by the Colonial Office and the Admiralty on the use of this

16. See Gorrie to Hicks Beach, August 18, 1879, C.O. 225/3/16842; Gordon to Hicks Beach, October 11, 1879, C.O. 225/3/19614. There was a continuing dialogue between the Colonial Office and the Admiralty between 1879 and 1881, see C.O. 225/4-9.

17. Gordon to Hicks Beach, February 24, 1879, C.O. 225/4/3095; Hicks Beach to Admiralty, September 20, 1879, C.O. 225/3/14078.

18. Admiralty to Hicks Beach, November 8, 1879, C.O. 225/3/17696; see also Gordon to Kimberley, May 20, 1881, C.O. 225/7/11583.

19. Hicks Beach to Admiralty, September 20, 1879, C.O. 225/3/14076; Admiralty to Hicks Beach, November 8, 1879, C.O. 225/3/17696.

20. Gordon to Kimberley, March 26, 1881, minutes, Fuller, May 11, 1881, Bramston, May 12, 1881, C.O. 225/7/8088.

21. James, Herschell to Kimberley, July 14, 1881, C.O. 225/9/12583.

22. Gordon to Kimberley, April 28, 1880, C.O. 225/5/9483.

23. Admiralty to Kimberley, February 9, 1881, C.O. 225/8/2247.



device on certain occasions meant that naval officers could exercise certain magisterial powers in cases where whites were the offenders. So some of the power which the officers had possessed before the creation of the High Commissionership was restored to them. Naval power was made more effective judicially but this did not really add to the overall authority of the high commissioner.

None of these proposals solved the problems of relations between the high commissioner and naval officers; nor did they establish a more legally secure jurisdiction over natives. On the first point the general upshot of the negotiations between 1879 and 1881 was still a loose arrangement of consultation between the officers and the high commissioner whenever this was possible.<sup>24</sup> It was the responsibility of the officers to determine if acts of war were necessary and to undertake them. At the same time the naval officers were instructed to consult with the high commissioner if this was possible without creating too great a delay for effective action to be taken. If it appeared whites had given provocation a report was to be made to the high commissioner.

So the high commissioner was obstructed by the Admiralty and ultimately by the law. As Herbert observed: "He is not the Potentate originally contemplated by the Colonial Office."<sup>25</sup> But it was not only the Admiralty that limited the high commissioner's superiority. The Foreign Office was jealous of its position and would not consider a definition of the high commissioner's power as consul-general in such a manner as to make him the dominant figure in the Pacific with control also over naval officers.<sup>26</sup>

The final solution, of course, was to resort to imperial legislation to afford to the high commissioner whatever authority he needed. He might be empowered directly to deal with outrages by natives on British subjects. For this there was the precedent of the 1871 West Africa Settlements Act but Pouncefote objected

24. Admiralty to Kimberley, June 28, 1881, C.O. 225/8/11543.

25. Minute, Herbert, January 15, 1880, C.O. 225/3/19614.

26. Hicks Beach to Salisbury, March 26, 1879, minute, Buckley, March 31, 1879, Salisbury to Hicks Beach, May 9, 1879, F.O. 58/166.

to an extension of the principle of that act to the Pacific situation.<sup>27</sup> He saw through to the real problem, that in an area like the Pacific the legal remedy might not be so suitable as the naval one. In the West African case the legislation was designed to cover outrages committed inland where the navy could not reach. In the western Pacific that was not the problem. If the legislation was adopted the only effective power in the area—that of the navy—would be replaced by a “civilized” court which would not have the means to operate satisfactorily. Police and other regular law enforcement officials would have difficulty in patrolling so large an area, delays would arise, and injustices would occur. So on grounds of policy the Foreign Office declined to recommend legislation for the western Pacific.

The most damaging objection to the proposal that jurisdiction be obtained by legislation was the legal one. Herbert acknowledged this: “The Queen cannot give, and should not ask Parliament to pretend to enable Her to give, the High Commissioner direct legal jurisdiction over natives who are not British. . . .”<sup>28</sup> But such legal niceties were of little comfort or concern to the high commissioner and his assistants as they faced a deteriorating situation, where massacres of ship crews continued and general lawlessness seemed to be worsening.

In May 1881 Bramston took a long look at the Pacific situation in response to the growing concern in London about massacres of British subjects by natives.<sup>29</sup> He deplored the rude, retaliatory remedies that were available and strongly urged that more judicial methods be adopted. For example, the commander and some of the crew of the *Sandfly* had been massacred; in retaliation several villages were destroyed. Bramston thought it was time to assume British jurisdiction over the natives so as to check the commission of violent crimes on British subjects. In recommending the assumption of such jurisdiction he queried the correctness of the argument of the law officers in their western Pacific decision of 1879.<sup>30</sup> They had stated that for reasons of interna-

27. Minute, Pauncefote, April 12, 1879, F.O. 58/166.

28. Minute, Herbert, January 15, 1880, C.O. 225/3/19614.

29. Memorandum, Bramston, May 2, 1881, C.O. 225/9/20093.

30. Holker, Giffard to Hicks Beach, March 20, 1879, C.O. 225/4/4488.

tional jurisprudence, such jurisdiction as was desired could not be taken over foreigners like the islanders in the Pacific. Bramston now asked whether the lawyers were accurate in regarding these "savages" as foreigners. He suggested that a case could be made for the argument that in the case of savages who did not have a recognized civil government the British Parliament might through legislation empower British authorities to try and punish offences committed by the savages. In other words, a special jurisdiction could be created limited to those people. Bramston was pointing to the possibility of applying differing rules of foreign jurisdiction for savages and for the subjects of civilized or recognized governments.

Lord Kimberley, the colonial secretary, agreed with Bramston about the urgent necessity of assuming jurisdiction over natives for outrages against British subjects.<sup>31</sup> This ought to be done whether or not there was a precedent for it. As a practical matter he saw no problem since there was no one who could object. Since the natives had, by a basic assumption of British policy, no government which could make representations on their behalf, no objections could come from that quarter; nor could they come from foreign governments since there was no intention of interfering with their subjects. For policy reasons the move was desirable; and for reasons of justice and humanity there were good grounds for dispensing with the armed force of the navy and instead for using a regular trial. Indiscriminate, retaliatory punishment seemed to have little effect other than to perpetuate ill-feeling between whites and natives, to confound the innocent with the guilty, and to encourage whites to take the law into their own hands. Violence begot violence.

In the Australian colonies there was support for any move by Britain which asserted more control over the Pacific, whether by way of annexation or by a more informal exercise of jurisdiction. At an intercolonial conference at Sydney in 1881 delegates from the various colonies prepared a remonstrance to the Colonial

31. Minute, Kimberley, May 22, 1881, C.O. 225/9/20093; also see Selborne to Gordon, October 18, 1881, Selborne MSS 1873, f.136.

Office upon the subject.<sup>32</sup> They condemned the lack of power of the high commissioner to deal with natives. The colonies were impatient with the ineffectiveness of British policy. And in mid-1881 both Bramston and Kimberley noted with favor these colonial attitudes.

There were two precedents for the type of legislation that Bramston had in mind—the 1874 Courts (Straits Settlements) Act and the 1871 West Africa Settlements Act. These acts had established the principle of British jurisdiction over natives in less civilized areas under certain circumstances. Now Bramston intended to extend that principle to the islands of the western Pacific. The high commissioner's court (or some analogous tribunal) should have jurisdiction over crimes committed by persons not subjects of any civilized power. The Pacific case was not, of course, fully comparable to the two precedents; in the Straits Settlements Act a residence requirement was provided while in the African case a distance requirement was set. But these differences were not of the essence of the matter.

Lord Selborne, the lord chancellor, reacted favorably to the proposal when it was raised by Kimberley.<sup>33</sup> He had some qualms about the theoretical basis of the proposed legislation but thought these could be set at rest by reference to the law of piracy on the high seas. There was a resemblance in principle between piratical acts and attacks upon unoffending strangers by savages living under no settled or responsible government. Such an argument could explain the basis of the two precedents and it could be used to justify the obtaining of like legislation for the Pacific. "Such legislation would be in the interest of humanity." But he also urged that it be carefully limited to acts of murder or other violence. Selborne was concerned to liken it as closely as possible to the law of piracy. And so for humanitarian reasons, for the preservation of innocent lives, he was agreeable to British inter-

32. Resolution concerning islands in the Pacific, January 25, 1881, in "Minutes of Proceedings of the Inter-Colonial Conference held at Sydney, January 1881," No. 62, pp. 15–16, Victoria, *Parliamentary Papers*, IV (1880–81).

33. Note, Selborne, May 30, 1881, C.O. 225/9/20093; also Selborne to Gordon, October 18, 1881, Selborne MSS 1873, f.136. On Roundell Palmer, Lord Selborne, see Appendix.



vention but he was not condoning a wide interference by Britain in native affairs.

Bramston's draft bill received Admiralty approval and also the concurrence of the Foreign Office.<sup>34</sup> This time Pauncefote surprisingly approved the bill in principle on the grounds of expediency. Two years earlier he would not consider such legislation. Now he thought: "The necessities of the case entirely justify this departure from the strict rules of international jurisprudence as observed in matters of jurisdiction by civilised states *inter se*." His approach, like Selborne's, was basically humanitarian. A regular trial was a more humane method of punishing savages for crimes of violence than naval acts of retaliation. But he was not prepared to depart further from the established rules of international law; he would not agree to the exercise of criminal jurisdiction over foreigners in such areas without a treaty.<sup>35</sup> He was also concerned about the details of the operation of the proposed legislation and many Foreign Office suggestions were made about court and judicial arrangements. The Colonial Office was not too appreciative of these points because it wanted to keep details to a minimum. It seemed safer to keep matters discretionary, depending upon circumstances and so avoid highlighting the irregularity of the scheme.<sup>36</sup>

Since the lord chancellor had already given his approval to the principle of the bill the Colonial Office saw no need to seek immediately the approval of the law officers. Herbert commented that the previous law officers (in 1879) had misapprehended the position of savages and he thought the present law officers need not be consulted until the draft bill was in its final stages.<sup>37</sup> But legal opposition came from another source. Jenkyns, who was

34. Admiralty to Kimberley, June 28, 1881, C.O. 225/8/11543; minute Pauncefote, October 15, 1881, Granville to Kimberley, November 15, 1881, C.O. 225/9/20093.

35. The Foreign Office and the Colonial Office considered various proposals about the courts to be used—British ships, a special court, Australasian courts, high commissioner's court; see correspondence between both departments, October 1881–January 1882, C.O. 225/9/20093.

36. For example, see minutes, Bramston, October 18, 1881, Herbert, November 22, 1881, C.O. 225/9/20093.

37. Minutes, Herbert, January 26, 1882, C.O. 225/9/20093; Bramston, March 29, 1882, C.O. 225/11/5402.



called in to complete the drafting stage, condemned the principle underlying this Pacific islanders bill.<sup>38</sup> He distinguished it from the West African and the Straits Settlements legislation on the grounds that there the natives had already submitted themselves in some form or other to British jurisdiction. In the West African case the native could be proceeded against if he was found within the limits of the British settlements; in the Straits Settlements case a residence requirement was imposed. In both cases the native could be said to have come within the allegiance of the queen by his own actions. The fact that the native could not be tried unless he was apprehended or had resided in the colony where he was about to be tried meant that he had already undergone some exposure to civilized Western life. The new bill, however, proposed to take savages who had never been in a civilized community to a colony hundreds of miles away to try them by the forms of English law which meant nothing to them. They would know no one there and would have virtually no power to defend themselves or to call witnesses. Jenkyns was approaching the matter on sentimental and moral grounds and he despaired that the new system would have any advantage over an act of war. A native would be charged with an offence "against the peace of our Lady the Queen her Crown and dignity" yet he had never been within that peace. Natives who had never been subject to British jurisdiction or been within the queen's allegiance would be tried for the offence of attacking persons who, in their minds, had improperly entered their territory.

But it was not for Jenkyns to reject the bill or its underlying principle; it was his task to settle the form of the bill. So his criticisms were made merely for noting and he proceeded to seek the best possible justification for the legislation and to incorporate it in his drafting. The defence rested upon the principle that in the interest of the natives a legal procedure was better than the actions of warships. So he framed the bill upon the assumption that there existed a state of war or a condition similar

38. Jenkyns to Herbert, April 4, 1882, C.O. 225/11/6044.

to that in a conquered country where the powers of the conqueror were being exercised. So soon as any of those powers were transferred to a civilian or a court civilly constituted it was necessary to provide for the legality of such civilian action. The new legislation was designed to do that. It allowed the creation of a rough species of court to replace a more rough and ready naval system. One clause made the usual claim that the act did not confer any dominion on Her Majesty; Jenkyns, however, observed in private that such a savings was inconsistent with the nature of the bill.

Jenkyns disliked the whole scheme and warned that it would obviously raise for discussion in Parliament the whole question of the British treatment of natives in the Pacific and possibly elsewhere. Such an eventuality was always viewed with abhorrence by the Colonial Office and so serious consideration was given to Jenkyn's criticisms.<sup>39</sup> Herbert stood by the draft. Its effectiveness would depend very much upon the discretionary use of the people putting it into operation; but irrespective of the ability of those people Herbert acted upon the basis that any deliberate trial was preferable to any summary procedure. Accordingly he still regarded the bill as "a tolerably successful endeavour."

Somehow in the ensuing months the bill was pushed aside in the mess of other work. After a lapse of over six months—at the beginning of 1883—it came to the attention of Lord Derby, the new colonial secretary, who briefly minuted: "The bill is a complete innovation in regard of its theory, whatever may be said of its working."<sup>40</sup> And, although it was referred later that year to the western Pacific committee chaired by Gordon no further action was taken on it. So the opportunity was missed where again an easy expansion of British jurisdiction might have been achieved. And the loss came just when the Colonial Office seemed on the brink of success. Some legal approval to the principle had already been given—by the lord chancellor. Yet

39. Minute, Herbert, May 26, 1882, C.O. 225/11/6044.

40. Minute, Derby, January 31, 1883, Derby to Gordon, February 2, 1883, C.O. 225/11/6044.

the ultimate failure was probably on the ground of legal principle. As Jenkyns pointed out, the legal innovation which the lord chancellor had approved would probably raise for public debate the whole question of British policy on native relations. This was a question that the Colonial Office well chose to avoid.

The western Pacific committee of 1883-84 drew attention again to the many inadequacies in the working of the western Pacific Orders in Council and the lack of effective jurisdiction in the Pacific area.<sup>41</sup> It itemized the frustrating opinions of the law officers, the indignation of the Australian colonies over the lack of British action, the irritation of traders over the failure to control natives. The powers of the high commissioner had been rendered inoperative through failings in the Orders in Council which at the same time had tied the hands of naval officers. These criticisms were sound, as were the recommendations—for a revised Order in Council with jurisdiction in certain cases over natives; the separation of the offices of governor of Fiji and high commissioner; the appointment of more deputy commissioners. Annexation by a colony was disapproved of, as was token annexation by Britain. Overall it was an endorsement of increased powers for the high commissioner, a report which was scarcely surprising since Gordon was one of the three members of the committee. This was a call for effective action to be taken by the government: "it is impossible longer to maintain a purely negative policy."

As with the Pacific Islanders Bill of 1881-82 no action was taken upon the report of this committee. The holding of an intercolonial conference by the Australasian colonies at the end of 1883 postponed any immediate action; further delay arose after 1884 when Britain and Germany began negotiating about their respective interests in the Pacific.<sup>42</sup> The matter just lapsed. In spite of constant pressure since 1879 no constructive step was

41. "Report of a Commission Appointed to Inquire into the Working of the Western Pacific Orders in Council and the Nature of the Measures Requisite to Secure the Attainment of the Objects for which Those Orders in Council Were Issued," October 16, 1883, [C.3905], *P.P.* 1884, LV.

42. Ashley, February 11, 1884, 3 *Parl. Debs.*, CCLXXXIV (1884), 417; Fitzmaurice, March 30, 1885, 3 *Parl. Debs.*, CCXCVI (1884-85), 997.

taken to correct the jurisdictional problems of the Pacific. Neither Gordon with his complaints, nor the Colonial Office through a long series of negotiations with the Admiralty and the Foreign Office, had been able to produce a satisfactory solution. The ultimate cause of the problem was the legal interpretation of Britain's exterritorial powers as enunciated by the law officers in 1879 and alluded to by the parliamentary counsel in 1882.

This inflexibility in the law with regard to jurisdiction over non-British persons in areas which no civilized foreign power had claimed bedevilled British administration all over the western Pacific and had particular consequences in New Guinea which led to its eventual annexation by the British crown. During 1884 various interests came into conflict over the eastern part of New Guinea—demands by Australian colonies for annexation, disinclination by the British government to take action, forward drives by the German government to take possession.

In April 1883 the colony of Queensland tried to force the pace and without waiting for British approval took the initiative on its own. Henry Chester, police magistrate, took possession of all New Guinea east of Dutch territory in the name of the queen.<sup>43</sup> This greatly upset the British government. Apart from policy considerations it was not legally possible for a colony to take such action. The lord chancellor, Lord Selborne, strongly denounced this "monstrous" move of attempted annexation.<sup>44</sup> He approached it from a legal and moralistic point of view. Thinking of the Fijian case he argued for the necessity of an invitation or concurrence on the part of the principal native tribes or their rulers that action be taken by British authorities. Also the Queensland action was condemned as being morally unjustifiable; in any case it did not fit in with British policy for the area. Accordingly the annexation was disowned.

This step did not allay Australian fears about foreign penetration of the area and so further schemes for British involve-

43. Telegram, Kennedy to Derby, April 16, 1883, "Further correspondence respecting New Guinea," [C.3617], p. 131, P.P. 1883, XLVII.

44. Selborne to Gordon, April 16, 1883, Selborne MSS 1874, f.10.



ment were put up.<sup>45</sup> Some of the colonies even agreed to help bear the cost of more effective British control there. Meanwhile German commercial and colonial interest in the South Pacific was increasing. Under pressure from those two fronts the Colonial Office by July 1884 was ready to pursue a policy of protection over eastern New Guinea.<sup>46</sup> But delays then arose in obtaining cabinet approval and in defining how much of the eastern part of New Guinea would be protected. And in the meantime the German government approved action to establish German sovereignty on the northeast coast of New Guinea. While German officers were performing these tasks on the northeast coast British officers had begun carrying out British policy along the southern coast and part of the northeast coast.<sup>47</sup> In November 1884 Commodore Erskine officially proclaimed a British protectorate over part of New Guinea and the adjacent islands.

Legal form had to be given to this proclamation and this almost immediately raised the question of jurisdiction over foreigners. This problem had been alluded to in the New Guinea case as early as 1878 when Gordon as high commissioner prepared a lengthy statement on expected European expansion into the area.<sup>48</sup> He was very aware of the shortcomings of the 1877 Order in Council which included New Guinea in its sphere of jurisdiction. It seemed obvious that like the rest of the South Pacific there would be significant penetration of the area by

45. See circular, Derby to governors of New South Wales, Victoria, South Australia, Queensland, Tasmania, New Zealand, Western Australia, May 9, 1884, "Further Correspondence Relative to New Guinea . . . Colonies," [C.3839], p. 35, P.P. 1884, LV.

46. For background on changes in British policy on New Guinea in mid-1884 see Donald C. Gordon, *The Australian Frontier in New Guinea, 1870-1885* (New York: Columbia University Press, 1951), pp. 245-47, Morrell, *Britain in Pacific islands*, pp. 254-57.

47. Confusion arose as to instructions concerning the establishment of the protectorate and so two steps were taken to proclaim it, in October and November, 1884. As a result of the German move, the British protectorate was extended in December 1884 to include more islands off the coastline. See Admiralty to Derby, November 14, 1884, C.O. 225/16/19446, November 29, 1884, C.O. 225/16/20410, December 8, 1884, C.O. 422/1/20922.

48. Gordon to Hicks Beach, November 22, 1878, *Confidential Print*, Australia No. 90, C.O. 881/6.



Europeans of all nationalities; yet there would be no effective control that the high commissioner could exercise over them. Gordon's remedy was annexation, a policy which the British government would not consider either at that time or in 1884.

Some confusion or misunderstanding arising out of legal theory existed in the minds of members of the government as to the nature of the responsibilities that they were undertaking in the new protectorate. In reply to a question in the House of Commons, Prime Minister Gladstone stated categorically that the jurisdiction being assumed would be "sufficient to afford protection to the Natives against lawless action, by whomsoever taken, whether by British subjects or foreigners."<sup>49</sup> A similar assertion was made later by Ashley, Colonial Office under-secretary: ". . . British authority will have jurisdiction over subjects of Foreign Powers as well as over natives."<sup>50</sup> In fact English law did not provide that a protectorate took jurisdiction over foreigners; nor for that matter did it assert very much, if any, control over natives. The blanket statements made by both politicians went much further than either existing practice or theory confirmed. Indeed the statements really pointed to sovereignty and would have required annexation if carried into effect, a point which neither speaker at the time seemed to realize. The government had undertaken protection without a clear notion of the nature of a protectorate.

The government, however, was now committed through these public statements and it rested upon the Colonial Office to devise a scheme of implementing the policy. In any case the Australian colonies had long been pressing for the establishment of a full and effective jurisdiction. Bramston considered that the Foreign Jurisdiction Acts would not meet the case since they failed to confer protection either on British subjects against the acts of natives or on natives or British subjects against the acts of foreigners who were the subjects of civilized states.<sup>51</sup> The

49. Gladstone, August 11, 1884, 3 *Parl. Debs.*, CCXCII (1884), 439.

50. Ashley, October 24, 1884, 3 *Parl. Debs.*, CCXCIII (1884), 155.

51. Minutes, Bramston, October 22, 1884, Herbert, October 29, 1884, C.O. 225/17/18591.

New Guinea case was as difficult as any of the other Pacific cases in that there did not appear to exist any government from whom Britain could obtain power or jurisdiction by treaty or any of the means listed in the Foreign Jurisdiction Acts. Bramston was also quite concerned about New Guinea because if the existing jurisdictional approach was applied there it would not be possible to fulfil one of the important objectives for which the protectorate was established—the protection of the natives.

One of the reasons, if not the principal reason which induced Her Majesty to assume a protectorate in New Guinea, has been the desire to preserve the natives in the enjoyment of their lands, or to protect their persons and property from outrage, at the hands of unprincipled white men, and with this object to obtain and enforce for the present full control of all settlement upon the protected area.

Existing British powers provided no control over unprincipled foreigners.

The most suitable remedy in Bramston's view was to bring the protectorate more directly under British sovereignty. He suggested this "not with any desire for the acquisition of the soil, but as the best means of securing an effective and legal control over all persons resorting thereto." Actually developments within New Guinea were beginning to bring official thinking in London round to favoring annexation. From the beginning of British interest in the area one of the main concerns in Whitehall had been the protection of the natives in their land rights and one of the first acts of the new administration had been to prohibit the sale of land. The Foreign Office then learned that a company was to be formed to buy land in New Guinea, and with the intention of circumventing the official British prohibition the company was seeking French protection.<sup>52</sup> The Colonial Office wondered whether Britain would have control over such a "foreign" company. Herbert hoped that the law officers would decide that sovereignty would need to be asserted as a basis for British jurisdiction in the area; that would settle the land problem and other similar jurisdictional questions. Derby, the colonial secre-

52. Granville to Derby, November 26, 1884, C.O. 225/17/20240.

tary, agreed: "Yes, sovereignty would make the matter simpler." But he added: "Then we must take on ourselves more of the duty of governing."<sup>53</sup>

The law officers took almost six weeks to decide how Britain might obtain the most effective control over the area. Perhaps one of the clerks in the Colonial Office was correct when he jested: "The novel institution of protectorates will produce a crop of nuts for lawyers to crack."<sup>54</sup> Indeed the lawyers were experiencing difficulties with the reference because they were not sure of all the implications of protection. So they called for more papers on earlier protectorates such as the Ionian islands.<sup>55</sup> They had been placed under the protection of Britain by a treaty in 1815 but this ceased in 1863 when the islands became part of the kingdom of Greece. Finally in December 1884 the lawyers decided that if legal jurisdiction over persons other than British subjects was desired it would be necessary to make the soil British.<sup>56</sup> They went on to state that British possession could be established by sending a British officer to administer and govern the area already under protection. Sovereignty so acquired would be by settlement and not by cession or conquest. This legal point appeared somewhat anomalous in practice since the government had forbidden settlement for the time being. But from a legal point of view no other decision could be made. There had obviously been no conquest; nor could any cession be established since the Colonial Office had given instructions to the law officers that there did not exist in New Guinea any government which could grant Britain power or jurisdiction by treaty, cession, or any other such means.

This decision that New Guinea would be a colony of settlement was inconvenient from an administrative level. It meant that the person appointed to administer the territory would not be able to make laws by proclamation. Laws would have to be

53. Minutes, Herbert, November 27, 1884, Derby, November 29, 1884, C.O. 225/17/20240.

54. Minute, Wingfield, November 27, 1884, C.O. 225/17/20240.

55. Minute, Bramston, December 4, 1884, C.O. 201/602/20707. Bramston collected a number of papers which he forwarded to the solicitor-general. It is not clear what those papers were.

56. James, Herschell to Derby, December 11, 1884, C.O. 422/1/21136.

promulgated by Orders in Council made in London. Alternatively this authority might be delegated to three or more residents in the colony; but at that stage of New Guinea's development it would be difficult to find three residents to whom such responsibility could be delegated. The easiest means of control would be for the local administrator to have sufficient legislative power in his own hands. So to avoid the inconvenience and delays that would arise with such a government the Colonial Office again approached the law officers with the suggestion that the territory might be regarded as being acquired by conquest or cession.<sup>57</sup> Bramston began to think that there were probably not many differences between the New Guinea and the West African situations. The chiefs of the former were probably not much less civilized than the kings of the latter; possibly Britain could make treaties with New Guinea leaders. But the law officers, although a different lot because of a change of government in mid-1885, agreed with their predecessors that territory in New Guinea could not be regarded as being acquired by conquest or cession.<sup>58</sup>

Meanwhile the Colonial Office was going ahead with arrangements to establish British sovereignty over New Guinea in line with the Law Office report. This operation actually took three years to effect.<sup>59</sup> A number of reasons were offered for the delay—financial contributions from the Australian colonies had to be worked out; the role of Queensland in taking responsibility for the actual administration of the colony had to be settled. And in the meantime numerous complaints came in from the special commissioner who had been appointed to administer the area about the limitations on his power.

In solving this problem of the exercise of effective jurisdiction and authority in New Guinea legal theory had played a considerable role. The basic foreign jurisdiction system operating over all the western Pacific was considered inadequate. The British government made assurances that a full and effective control would be exercised in the area. For those purposes a

57. Stanley to Webster, Gorst, July 9, 1885, C.O. 234/46/6079; minute Bramston, December 12, 1884, C.O. 422/1/21136.

58. Webster, Gorst to Stanley, July 20, 1885, C.O. 422/1/12776.

59. Sovereignty was established by the issue of Letters Patent, June 8, 1888.



protectorate was equally inadequate and so served only as a temporary device to give Britain a lien over the area while the final solution was worked out. The legal concepts of foreign jurisdiction and protection had to yield to that of annexation because only through the latter could the government's purpose be carried out. Legal theory alone was not the determining factor; economic considerations, problems of international and colonial policy also influenced the decision. But, nevertheless, it was legal theory that provided the options of policy and finally drove the government towards annexation, a move which in itself did not seem immediately necessary.

During the 1880s a similar problem was being encountered in Africa. At first the legal response was permissive but after 1884 it began to offer the same obstacles to jurisdictional extension as was already happening in the Pacific cases. With the latter, however, the main concern was to take jurisdiction over natives, but in Africa the issue centered more on jurisdiction over foreigners, the subjects of Western, civilized countries. But in both areas legal theory came to be a hindrance to the exercise of a full and effective British jurisdiction in the less civilized areas of the world.

The South African problem arose from the movement northwards from the Cape colony of British and other European settlers, traders, and adventurers. The Offences (South Africa) Act of 1863 was intended to cover jurisdictional problems involving British subjects south of twenty-five degrees of south latitude.<sup>60</sup> But such lines drawn on paper had little meaning to whites wandering across the vast reaches of South Africa and very soon British subjects had crossed those boundaries; furthermore the legislation failed to control non-British people whether or not they were within the boundaries. During 1879 one of the native chiefs, Khama of the Bamangwato (within present-day Bechuanaland), began to complain of the behavior of Europeans in his country.<sup>61</sup> But criticism came not only from a native viewpoint; Cape authorities were also upset and the attorney-general

60. 26 & 27 Vict., c.35 (above).

61. Enclosure in Frere to Hicks Beach, March 15, 1879, C.O. 291/2/6177.



there lamented the geographical and nationality restrictions on his power.<sup>62</sup> The existing legislation was not very popular in South Africa because it was too one-sided in that it punished British subjects for crimes on blacks but not the reverse.

Colonial Office approval was given, in principle, to the extension of jurisdiction, in some manner, beyond the existing boundaries. Various alternatives arose.<sup>63</sup> The 1863 legislation could be extended northwards as far as necessary although not with the intention of taking responsibility for non-British subjects. Alternatively a treaty or some agreement could be obtained with Khama and other relevant chiefs conferring jurisdiction in respect of crimes committed within their dominions by and perhaps against British subjects. Herbert considered that the situation paralleled that of the western Pacific and he was not prepared to go beyond the example of the Pacific Islanders Protection Acts and the appropriate Order in Council so far as jurisdiction was conferred over British subjects. In all, a geographical extension appeared appropriate but no serious thought was given to widening the range of people involved.

The matter was allowed to stand over temporarily while other problems like a South Africa confederation were mooted. Then early in 1880 the Colonial Office proposed that imperial legislation be amended extending the jurisdiction.<sup>64</sup> But again agreement could not be reached on which legislation to extend. Four options were under discussion. The 1863 act was the most obvious; a geographical extension was desirable but this did not solve the problem of foreigners. The Offences against the Person Act of 1861 was also under consideration.<sup>65</sup> The plan was to confer upon courts in Cape colony and Natal the jurisdiction under that act which was at the time being exercised in English and Irish courts. But the limitation with this suggestion was that the act was concerned only with murder and manslaughter. It was

62. See also Frere to Hicks Beach, August 19, 1879, C.O. 48/490/14349.

63. Minutes, Fairfield, April 19, 1879, Wingfield, April 21, 1879, Herbert, April 23, 1879, C.O. 291/2/6177.

64. Hicks Beach to Woseley, January 16, 1880, C.O. 48/491/20240.

65. See comments on Woseley to Kimberley, May 5, 1880, C.O. 179/134/7757; Lanlon to Woseley, April 23, 1880. C.O. 179/134/7757.

probably wise in the South African case to provide a wider cover of crimes although the plan did offer the advantage that only serious crimes would come before British courts while minor offences would remain under the control of the local chiefs. British interference could be kept at a minimum.

Bramston raised the third possibility.<sup>66</sup> This was to exercise jurisdiction by means of the Foreign Jurisdiction Acts, thereby avoiding a reference to Parliament. Lord Kimberley, the colonial secretary, agreed with Bramston on the desirability of not resorting to Parliament. The situation was seen as analogous to that in West Africa but, as happened there, it would be necessary to enter into treaties or agreements with the chiefs. A review of the Gold Coast situation was made in the Colonial Office.

The final course was to take no action at all. Political arguments in favor of this were raised by Grant Duff, the parliamentary under-secretary.<sup>67</sup> He believed Britain should move no further, otherwise there might be no limit to new and quite indefinite liabilities. "If the line is to be today the Zambesi, why not in process of time the French frontier in North Africa." His chief, however, overruled him on the ground that local circumstances demanded that some practical, British jurisdiction be introduced. Britain could no longer avoid some degree of responsibility in the area. Kimberley warned: "If we provide no means [of control] we shall have continually increasing confusion, leading to serious complications out of which will arise the very extension of responsibilities which we seek to avoid." At the same time Kimberley was keen to indicate that Britain did not intend to extend eventually its dominion over such areas. For that reason he thought it better not to use the 1863 act which might be taken to lay a basis of future claim to areas to the north of twenty-five degrees of south latitude. Treaties with chiefs whose territories bordered the two colonies and an exercise of power under the Foreign Jurisdiction Acts seemed to make no claim to future territorial rights.

66. Minutes, Bramston, June 12, 1880, C.O. 291/5/8383; Kimberley, June 15, 1880, Fowler, June 18, 1880, C.O. 179/134/7757.

67. Minutes, Grant Duff, June 22, 1880, Kimberley, June 23, 1880, C.O. 179/134/7757.

Bramston referred the whole question to the law officers asking them generally to review the best means by which British jurisdiction could be extended.<sup>68</sup> Was imperial legislation necessary? Could one of the existing acts be amended? Would an Order in Council under the Foreign Jurisdiction Acts be sufficient? The lawyers were also specifically asked whether the queen could acquire by treaty with native chiefs jurisdiction over persons who were the subjects of foreign, civilized states while they were resident within the chiefs' territories. For information the lawyers were referred to the legislation helping an extension of British jurisdiction in Sierra Leone, the Gambia, Gold Coast, Lagos, and the Straits Settlements; they were also informed of the existing act applying in South Africa.

The law officers approved the more convenient of the alternatives, that the extension might be obtained by Order in Council under the Foreign Jurisdiction Acts without a special act of Parliament.<sup>69</sup> So there would be no necessity to amend the geographical boundaries specified in the Offences (South Africa) Act. As to foreigners resident within native territories the lawyers thought that jurisdiction might be acquired over them by a treaty with the relevant native chief. But they added a politic warning that the exercise of jurisdiction obtained in such a manner might be the ground of diplomatic objection by the appropriate foreign power. And so to avoid such difficulties it seemed wise to exercise the jurisdiction only with the concurrence of the state concerned. This concurrence might be obtained either in a general manner or for a particular instance.

The tenor of this report was not unusual. It reflected the usual approach taken when foreign subjects were involved and it acknowledged that legal concepts were influenced partly by the politics of international relations. A similar case concerning Morocco had been decided in 1874. The law officers had then stated that a British consular court could have jurisdiction over foreigners but only if that power was granted by a treaty with

68. Minute, Bramston, June 19, 1880, Kimberley to James, Herschell, June 28, 1880, C.O. 179/134/7757.

69. James, Herschell to Kimberley, August 3, 1880, C.O. 48/498/11829.

the foreign state or by the personal consent of the foreign suitor.<sup>70</sup> The 1880 opinion became a cornerstone in future cases of a like nature. On the surface it seemed quite permissive in relation to any move to extend jurisdiction; the qualifications were of a political or diplomatic nature. But successive interpretations made these qualifications more stringent and restrictive. The political warning increasingly took the form of a legal prohibition upon the extension of jurisdiction over foreigners.

This report was satisfactory from the point of view of the Colonial Office but no immediate action was taken to implement it because attention became focussed on more pressing problems concerning relations between Transvaal Boers and the Cape colony. So the opinion was stood aside for future action if required.<sup>71</sup> Although a clear statement had been made by the legal advisers on how British jurisdiction in uncivilized countries might be advanced, along with a consideration of the treatment of foreigners, it was left lying around as an unwanted precedent until 1884. That year the problem of jurisdiction in the Bechuanaland area was again raised. Some Boers had moved the previous year from the Transvaal republic and established the pocket republics of Stellaland and Goshen in southern Bechuanaland. These republics lay across the route to the north.<sup>72</sup> In May of 1884, Sir Hercules Robinson, the high commissioner for South Africa, negotiated treaties with two chiefs in the area—Mankoroane, chief of the Batlapin tribe, and Montsioa, chief of the Barolong—conceding to Her Majesty the right to exercise civil and criminal jurisdiction within their territories.<sup>73</sup> The terms of instructions given for the negotiations of the two treaties were very wide so far as concerned the group of people whom they would affect. "It would be well for you to proceed to obtain by treaty from Mankoroane

70. James, Harcourt, Deane to Granville, January 13, 1874; confirmed by their successors, Baggallay, Holker, Deane, November 9 and 21, 1874, F.O. 834/11.

71. See minutes, Bramston, September 22, 1884, Herbert, September 23, 1884, C.O. 48/498/11829.

72. For background on Boers in the area see Hugh M. Hole, *The Making of Rhodesia* (London: Frank Cass & Co. Ltd., 1967), pp. 14-18, Richard P. Stevens, *Lesotho, Botswana, and Swaziland* (London: Pall Mall Press, 1967), p. 118.

73. Derby to Robinson, March 5, 1884, C.O. 48/498/11829; Robinson to Derby, May 13, 1884, C.O. 417/1/9445.



and Montsioa a concession to the Queen of the right to exercise civil and criminal jurisdiction over all persons within their territories, together with other indispensable powers." And the terms of the treaties so obtained were very wide in this respect: "And I give the Queen to rule my country over white men and black men."<sup>74</sup> On the face of it Britain was assuming responsibility for the administration of justice not only over British subjects but also over other whites, as well as blacks. In addition, the treaties provided for the performance by Britain of certain executive acts, like raising taxes, making and changing laws, appointing judges, establishing courts, and doing all things necessary "effectually to confirm the government and authority which I give to the Queen by this agreement."<sup>75</sup>

If these new powers were to be exercised it was obvious that courts of some kind were needed, as well as a rudimentary administrative system. At this very time, the Foreign Office was preparing an Order in Council for West Africa referring especially to problems in the Niger Districts and Oil Rivers and Bramston thought that the new jurisdiction acquired in southern Africa might be exercised in a similar manner.<sup>76</sup> He was also thinking of a situation similar to that of the protected territories adjacent to the Gold Coast colony.

Although legal approval was given and appropriate treaties were already obtained, the actual creation of a judicial and administrative system in the two areas with jurisdiction over all whites began to drift as the Colonial Office and the Foreign Office took up for further consideration the question of jurisdiction over foreigners. The drift, however, was suddenly halted in October of that year and, for a change, even the interest of the British public was centered on the hitherto ignored Bechuanaland area. As usual, it took an outrage, an act of brutality, to evoke a general interest in imperial concerns. Christopher Bethell,

74. Treaties, between Great Britain and Mankaroane, May 3, 1884, between Great Britain and Montsioa, May 22, 1884, in "Further Correspondence Respecting the Affairs of the Transvaal and Adjacent Territories," [C.4194], p. 18, *P.P.* 1884, LVII.

75. See treaties and minute, Fairfield, June 27, 1884, C.O. 417/1/9445.

76. Minutes, Bramston, June 7, July 1, 1884, C.O. 417/1/9445.



a frontier policeman, had been barbarously murdered in Montsioa's territory by two Boers. A flutter of questions echoed in the House of Commons.<sup>77</sup> Apparently the murderers had escaped capture and fled to safety in the Transvaal. In previous months Bethell had treated Boers rashly, thereby incensing them; so it could be argued that he was partly responsible for his own demise. But in England the full facts were not known, newspaper reports were quite dramatic, and public feeling ran high demanding that something be done. To placate popular reaction the government felt obliged to take immediate steps to provide some provisional and rudimentary measures for the establishment of law and law courts in the area.<sup>78</sup>

The murder brought to the fore the question which the Colonial Office and the Foreign Office had been discussing of powers in the two areas where the "protection" treaties had been signed and the extent of the operation of the Foreign Jurisdiction Acts there. Foreign countries would be notified that their subjects in the protectorate would come under the authority of local English officials and courts (when established). But one complicating political factor to this scheme was the attitude of the Germans who were encroaching on the area. Bismarck appeared to be in ill-humor and the Foreign Office was not anxious to ask him for his concurrence. In the Colonial Office Fairfield began to turn away from the protectorate idea and suggested that it might be wiser to declare Bechuanaland British territory.<sup>79</sup> In his view there was in practice virtually no difference in the amount of responsibility involved in a full protectorate and in a country forming part of the British dominions; and the latter case had the advantage that there was no doubt about the position of foreigners. He saw the protectorate as a British device invented for the western coast of Africa in those situations where Britain did not wish

77. See numerous questions, October 27 and 28, 1884, 3 *Parl. Debs.*, CCXCIII (1884-85), 248-50, 343-45.

78. For the problem involved in instituting a system of effective punishment in the area see minute, Fairfield, October 24, 1884, C.O. 417/3/18113; also Derby to Robinson, February 5, 1885, C.O. 417/8/1223.

79. Memorandum on establishment of some form of government for Bechuanaland, Fairfield, October 29, 1884, minutes, Bramston, Herbert, October 30, 1884, C.O. 417/1/9445.

to deal with the slavery question. If the land was not British territory there was no need to bring in legislation for the abolition of slavery. But such a problem did not arise in southern Africa.

Herbert and Bramston agreed that annexation seemed unavoidable. This would provide sufficient authority to bring to trial those who murdered Bethell; but a more pressing reason was the need to provide legal power for the control of irregular forces or police that would be used to patrol the area and to check the Boers. In other words the lack of judicial machinery and the threat of growing lawlessness and disorder were forcing the Colonial Office to move towards a greater assertion of sovereignty. However, Derby, the colonial secretary, fearing so direct a step and doubtful that the government would approve annexation, called a halt to this line of thinking and instead asked for a clear statement on the legal position of protected territory.<sup>80</sup> Ashley, the parliamentary under-secretary, also thought legal help should be called in; he found himself under great harassment in the House of Commons on the question of punishing Bethell's murderers.<sup>81</sup>

The law officers prefixed their report with the warning that the matter was not free from doubt but they considered that Her Majesty might by Order in Council under the Foreign Jurisdiction Acts create a court with jurisdiction over all offences committed since the date of the two treaties in the territories of the chiefs.<sup>82</sup> So approval was given to the trial of foreigners such as the murderers of Bethell. The basis of such approval was the wide wording of the treaties signed by the two chiefs giving certain specified executive and rather general jurisdictional powers to British authorities.

This report suited the purposes of the Colonial Office and Bramston drew a draft of an Order in Council with wide jurisdictional limits so that criminals could not too easily escape be-

80. Minutes, Derby, October 31, 1884, Herbert, November 15, 1884, C.O. 417/1/9445.

81. Minute, Ashley, November 5, 1884, C.O. 417/2/18525; Ashley, November 6, 1884, 3 *Parl. Debs.*, CCXCIII (1884-85), 1115.

82. James, Herschell to Derby, November 15, 1884, C.O. 417/3/19495.

yond it.<sup>83</sup> The law officers approved this draft which empowered the high commissioner to establish courts of justice in the two areas now under British protection.<sup>84</sup> The order, however, was wider in geographical scope than the areas comprehended within the two territories for it applied to all the uncivilized areas south of twenty-two degrees of south latitude, east of the twentieth meridian of east longitude, north of the Cape colony, and west of the South African Republic. The territories of Montsioa and Mankoroane, although the boundaries were not clearly defined, did not include all that area but for reasons of administrative expediency the order took the extended scope. Nevertheless, jurisdiction over natives and Europeans was confined to the territories covered by the two treaties. So the extended geographical scope had real, jurisdictional effect only so far as concerned British subjects or persons enjoying British protection. And in the exercise of executive powers the order took a more restricted approach than was necessary. Although in the preamble of the order the grant of executive powers such as taxing to the British authorities was recited no reference was made in the body of the order to the exercise of those powers.

The lawyers had, in fact, proved themselves to be accommodating in the 1880 and 1884 Bechuanaland cases and had authorized the establishment of a jurisdictional system somewhat like that which had been created in the 1840s and 1850s in the Gold Coast protectorate. The basis of such jurisdiction was the competency of the native chiefs to cede all their powers, including those over foreigners and natives, to another power. In the Bechuanaland case the jurisdiction had been acquired by Britain in treaties of cession; in the Gold Coast it had arisen perhaps by treaties or written agreements but probably more by usage and sufferance. But, by contrast in the Pacific, the competency of the chiefs to make such grants had been denied. The protectorate concept was allowed to operate in Africa but not in the Pacific. The lawyers made no attempt to explain or describe clearly and

83. Minutes, Ashley, November 16, 1884, Herbert, November 25, 1884, C.O. 417/3/19495.

84. James, Herschell to Derby, December 23, 1884, C.O. 417/3/22026.

exactly why the two areas were treated differently; but the underlying reason rested upon an obvious assumption. It was a question of the degree of "civilization" or "savagery." In the Pacific case the British thought that it was too hard—almost impossible—to find anyone competent with whom a British official could deal. In nearly all the African cases there was a more recognizable political structure with whom political and legal arrangements could be negotiated and carried into operation with some degree of certainty and security.

While these discussions were going on in London developments in the Bechuanaland area were demanding more direct British action. So Sir Charles Warren was appointed a special commissioner and sent with troops to put down difficult Boers intruding on the area, to restore order and reinstate the natives on their lands. He was to insure a predominant British influence there until policy was settled.<sup>85</sup> These local actions had little obvious effect on the nature of the Order in Council other than in the sense that they reinforced the need for an order of some sort to give effect to British protection and interest in the area. Also it was obvious from the British point of view that because of Boer activity the British should, if possible, have jurisdiction over all foreigners. So the local situation pressed British officials into asking for an order which covered a wide range of people.

The Order in Council for the exercise of British jurisdiction in Bechuanaland and the Kalahari was issued in early 1885 but it did not go into full immediate operation.<sup>86</sup> The high commissioner was instructed not to proceed with the creation of elaborate legal establishments; instead judicial arrangements were to be carried out provisionally by the officer on the spot.<sup>87</sup> In fact these instructions were never changed and the Colonial Office failed to take advantage of the broad powers enabling the creation of a more definite legal structure.<sup>88</sup> Furthermore the order

85. Stevens, *Lesotho*, p. 119.

86. Order in Council, January 25, 1885.

87. Derby to Robinson, February 4, 1885, "Further Correspondence Concerning the Affairs of Transvaal and Adjacent Territories," [C.4432], p. 1, P.P. 1884-85, LVII.

88. Knutsford to Salisbury, July 3, 1890, C.O. 417/42/10939.



became inoperative in the most settled parts of Bechuanaland after the southern part of the protectorate was annexed in September, nine months after the issue of the order.

Sir Charles Warren, as special commissioner, was initially responsible for the management of affairs in the protectorate as spelled out in the order. It should be noted, however, that a protectorate had not been formally declared; rather it was seen to arise by implication through the two treaties of 1884 and the order of 1885. The areas for which he was responsible were three separate divisions—the two “treaty” territories, some other territories of native chiefs who were existing under some vague and informal protected relationship with Britain, and the territory of Stellaland which had been created as an independent Boer “government” but had been subdued by Warren’s forces. But almost as soon as Warren had begun to administer these areas legal authorities at the Cape threw doubt upon his powers as special commissioner and began to question the basis of the legislative powers for the area as conferred under the order for all purposes of government in the territories of Mankoroane and Montsioa.<sup>89</sup> The queries arose partly as a result of personal differences between Warren and Sir Hercules Robinson, the high commissioner, but became serious because of doubts in the legal position. The Cape officials also revived the question whether one could justify the assumption that power over all persons in the territories of the two chiefs had been transferred to Her Majesty by the treaties and the 1885 Order in Council.

In response to these queries Fairfield considered that Britain had acquired in that area general rights of legislation such as were acquired in a conquered or ceded colony. On that basis proclamations and laws made by Warren and a local assembly would be legal. Bramston largely agreed but gave a more detailed and reasoned argument.<sup>90</sup> He thought the case was akin to that of Cyprus in 1878 where all powers had been conceded to the crown by a convention. In such cases full administrative

89. Robinson to Derby, June 3, 1885, C.O. 417/5/11088, June 10, 1885, C.O. 417/5/11518.

90. Minutes, Fairfield, June 25, 1885, Bramston, July 2, 1885, C.O. 417/5/11088.



and legislative authority were taken by British administrators and jurisdiction was not limited to only British subjects. It was not like the usual case of foreign jurisdiction, such as in China, Japan, or Turkey, where the rulers of those countries had agreed to transfer only judicial powers over British subjects. Bramston also distinguished the Bechuanaland case from that of the Gold Coast in the 1840s; the latter had started as an anomalous and irregular situation although it had developed over the years to a position like the one now under question in southern Africa.

Bramston was beginning to show an understanding of the complexities of the foreign jurisdiction situation; he was prepared to distinguish origins and types of foreign jurisdiction. But he may have gone astray in his assumption that the two African chiefs understood and intended that a full grant of authority should be transferred to Britain. However the whole question of the legality of British authority in the area was of such importance that it was decided that the opinion of the law officers should be obtained. Certainly among the various members of the Colonial Office there was sufficient doubt about the legislative and administrative powers that Britain could exercise in a protectorate to warrant further enquiry and discussion.

In June 1885 a Conservative government under Lord Salisbury replaced the Liberals and the new law officers took a line contrary to that of their predecessors.<sup>91</sup> They claimed that neither the native African chiefs, nor the freebooter Boers who had settled in Bechuanaland could confer, either by treaty or sufferance, any jurisdiction upon Her Majesty over the subjects of any civilized power other than Great Britain. Accordingly the effect of the 1885 Order in Council was to enable the high commissioner to constitute tribunals in Bechuanaland with jurisdiction over British subjects and protected natives but not over other civilized foreigners. Jurisdiction over the latter could be obtained only with the consent of the government of the foreign subjects or by their own personal consent. The lawyers were now setting limits on the open words of the order.

91. Webster, Gorst to Stanley, August 10, 1885, C.O. 417/8/14312.

The author of this particular report seems to have been Gorst, the solicitor-general.<sup>92</sup> He had had previous legal experience with a similar problem. In 1878 legal advisers were called upon to decide upon the continuance of foreign jurisdiction in Cyprus after Turkey had signed capitulations with Britain. Cairns, the lord chancellor, suggested that capitulations with foreign countries wherein extraterritorial privileges were granted should cease in a Moslem country like Turkey if a Christian state had instituted there a satisfactory tribunal for the exercise of civil and criminal jurisdiction.<sup>93</sup> So a court structure established by Britain under an agreement with Turkey could function in respect of foreign as well as of British subjects.<sup>94</sup> Gorst had objected to the lord chancellor's statement in 1878; seven years later, when a similar problem arose in the case of the Bechuanaland protectorate, Gorst, now a law officer, was able to express his contrary understanding of the legal position concerning foreigners in a protectorate or foreign jurisdiction area. He argued that semi-civilized or barbarous rulers could not by treaty or otherwise transfer jurisdiction over foreigners to another power. In Gorst's view the lord chancellor had been incorrect and to the disadvantage of English law and policy had led astray successive law officers since 1878.

Gorst expressed this same view a few days earlier in another report, concerning the question whether the surrender of Bethell's murderers who had taken refuge in the Transvaal might be demanded from that republic.<sup>95</sup> He issued a separate opinion stating that even if surrender could actually be arranged as a practical fact the tribunals in Bechuanaland would have no jurisdiction over foreigners. Webster, the attorney-general, made no comment upon the jurisdiction of Bechuanaland tribunals.

In adopting this approach the law officers were not acting

92. Gorst, see Appendix; minute, Davidson, October 18, 1886, F.O. 64/1152.

93. Cairns, see Appendix; memorandum, "Turkish Capitulations with Foreign Countries as Affecting Cyprus," in Cairns to Pauncefote, September 23, 1878, C.O. 885/12.

94. See minute, Pauncefote, September 25, 1878, Salisbury MSS (E/Pauncefote).

95. Gorst to Stanley, August 4, 1885, Webster to Stanley, August 4, 1885, C.O. 417/8/13826.

alone but had first canvassed other legal opinions. Wright, junior counsel to the Treasury, prepared a detailed memorandum in which he concluded that in the African protectorates consular jurisdiction should be confined to British subjects.<sup>96</sup> If more jurisdiction was needed or desired, the appropriate solution was for Britain to assert sovereignty. Davidson, one of the devils for the law officers, prepared a report in which he argued in contrary fashion claiming the right to assume jurisdiction over foreigners.<sup>97</sup> He did allow, however, that for reasons of diplomacy the consent of the foreign country should be obtained.

The new line taken by the law officers spelled out very definitely the legal prohibition which the 1880 report had ignored. The latter had raised political considerations of a restrictive nature but avoided a legal statement of prohibition; indeed that report virtually affirmed the opposite. The 1884 reports had followed that lead. Now the Colonial Office was faced by an abrupt change in legal theory and it reacted hostilely. Fairfield blasted the 1885 opinion as "more rhetoric and politics than law," and thought it might help if the law officers could be sent back to school to learn some history of the British Empire.<sup>98</sup> Fairfield was obviously pushing a practical rather than a legal and theoretical approach. He argued that if the new legal reasoning were adopted there would be no British Empire in India. Bramston took a calmer look at the report but noted the inescapable conclusion that the present law officers held their predecessors to have been wrong. So a new course of action would have to be taken.

As it was this was not too difficult because the Colonial Office was already in the process of settling upon a policy of annexation of part of the Bechuanaland area. So the effect of the law officers' report was to reinforce the direction of this policy. And, accordingly, on 30 September 1885 the colony of British Bechuanaland was created by annexing that part of the protectorate

96. Wright, see Appendix; memorandum, Wright, August 1885, F.O. 97/562.

97. Davidson, see Appendix; minute, Davidson, November 24, 1886, F.O. 64/1152.

98. Minutes, Fairfield, Bramston, August 12, 1885, C.O. 417/8/14312.

south of the Molopo River. Herbert was pleased to settle the issue, asserting "we have done what this opinion practically requires."<sup>99</sup> The protectorate concept had been found wanting in theory because it failed to provide for the full exercise of jurisdiction and administration that the Colonial Office wanted to possess in the region. Once again the solution was a proclamation of British sovereignty.<sup>100</sup>

Also in September 1885 the rest of Bechuanaland (north of the Molopo river, and south of the twenty-second parallel of south latitude), was affirmed officially as a British protectorate. The annexation policy had done nothing to settle the same problem of jurisdiction over foreigners in the northern area. During the year Warren had negotiated for treaties of friendship and protection with three leading chiefs of upper Bechuanaland—Khama of the Bamangwato, Sechele of the Bakwena, and Gasitsive of the Bangwaketse. These three had proposed to cede to Britain jurisdiction over white men, almost in the same manner as Mankoroane and Montsioa had done.<sup>101</sup> Khama was willing to "give to the Queen to make laws and to change them in the country of the Bamangwato, with reference to both black and white." Sechele gave "to the Queen to rule among white people wherever they are." Gasitsive was not so liberal in his grant, which extended only to "white inhabitants of the country being under the rule of the Queen." But legal doubts still remained as to whether this covered all foreigners or only British subjects. One of the chiefs inquired as to the implications: could he try white offenders in his territory or should he hand them all over to British officials?<sup>102</sup> The high commissioner did not know the

99. Minute, Herbert, August 13, 1885, C.O. 417/8/14312.

100. Note that in a later minute, Herbert, August 16, 1885, C.O. 417/8/14312, Pauncefote claimed that the law officers were disposed to reconsider their opinion and state it less decidedly in a similar reference (August 5, 1885) concerning the Niger protectorate. I do not think that they stated it any "less decidedly." In any case it did not alter the Bechuanaland case under consideration by the Colonial Office. The Niger case is discussed later.

101. See telegram, Derby to Robinson, March 14, 1885, Derby to Robinson, April 21, 1885, "Further Correspondence Concerning the Affairs of Transvaal and Adjacent Territories," [C.4432], pp. 48, 106, *P.P. 1884-85*, LVII; the three treaties are set out in "Further Correspondence Respecting the Affairs of the Transvaal and Adjacent Territories," [C. 4588], pp. 45-48, *P.P. 1884-85*, LVII.

102. Robinson to Stanley, January 6, 1886, private, C.O. 417/10/2418.



legal position and sought directions from the Colonial Office. He suggested that it could be advantageous to issue a new Order in Council extending British jurisdiction northwards to include the new areas and also to cover all whites. He made the latter suggestion in line with his interpretation of the wide scope of the 1885 order.

Whitehall was reluctant to endorse the high commissioner's suggestion. There were few whites in upper Bechuanaland and those that were there seemed for the most part decent traders or missionaries.<sup>103</sup> All that Britain wished to do was to promise to protect the chiefs against external violence whereas the effect of the high commissioner's proposal was to bring one step nearer the establishment of British dominion up to the Zambesi. In view of the opposing reports of the two sets of law officers and since the Conservative government had fallen and Gladstone was back in power it was decided that a third set of law officers should be consulted for a further opinion.

This reference became a full-scale consideration of the rights that chiefs could give and that Great Britain could acquire by treaty or convention over foreigners.<sup>104</sup> The background in Bechuanaland, along with the reports of 1880, 1884, and 1885, was outlined. The native chiefs were described as being "completely independent of any superior authority." The law officers were told that "it may be taken that they [the chiefs] are competent to cede or delegate their sovereign authority or any portion of it." In other words the Colonial Office reference sought to liken the situation to that of any civilized, Western sovereign power. The reference also claimed that no rule existed in international law limiting the right of an independent chief in the exercise of full civil and criminal jurisdiction over Europeans or others. Further in this attempt to influence the law officers to give a convenient answer to the problem Bramston drew attention to the precedent of the 1878 convention with the Porte whereby

103. Minute, Fairfield, February 15, 1886, C.O. 417/10/2418.

104. See minutes, Bramston, February 16, Herbert, February 16, Morgan, February 18, 1886, Granville to Russell, Davey, March 15, 1886, C.O. 417/10/2418.



Britain acquired full jurisdiction in Cyprus over all persons of whatever nationality.

The new law officers followed the line set by their predecessors in 1880.<sup>105</sup> Accordingly the queen could by a formal agreement or treaty with the chiefs acquire the right to exercise full jurisdiction over the subjects of other civilized powers; that jurisdiction could be exercised by courts established under an Order in Council similar to that of 1885. But the lawyers added a rider of expediency, like in the 1880 report; for safety, the assent of the foreign power concerned should be obtained, either generally or in the particular case. The lawyers acknowledged that their report was made upon the very basic assumption as instructed by the Colonial Office that "the chiefs have sovereign territorial authority, and do not merely exercise tribal or personal authority as chiefs." Yet this was probably the very question that should have been raised for a legal decision.

Some thought had already been given in the Colonial Office to the question of the competency of the chiefs and there was no perfect agreement. In this reference the official line was in support of competency. But Fairfield was not convinced. In 1884 he had doubted whether any law of a native territory could be said to apply to a crime committed there by a white man.<sup>106</sup> He described the jurisdiction of the chiefs as personal over their followers and not territorial. The chief might murder or expel a white man, or make war on a group of them, but he could not adjudicate their offences. When the matter arose again in 1886 he had the same doubts. He pointed out that although the Colonial Office had for practical purposes assumed that the chiefs had territorial jurisdiction an anthropologist would probably decide the jurisdiction was personal. Bramston, however, had fewer qualms and looked to the example of the German protectorates where German officials had no doubt as to their own jurisdiction.<sup>107</sup> If either of them had looked at British colonial policy from a broad, overall perspective he would have detected a basic,

105. Russell, Davey to Granville, April 21, 1886, C.O. 417/12/7059.

106. Minute, Fairfield, November 15, 1884, C.O. 417/3/19495.

107. Minutes, Fairfield, April 24, Bramston, April 27, 1886, C.O. 417/12/7059.

underlying inconsistency in British attitudes towards the Pacific and Africa. In the former it was usually accepted that the chiefs did not have the rights of a territorial sovereign; in the latter it was assumed they did. But it must also be remembered that in the Pacific case some flexibility was shown and after some years of hesitancy about acknowledging native sovereignty in the Fiji islands a cession of the islands was accepted in 1874. Perhaps the one consistent conclusion to this problem, whether in the Pacific or in Africa, was that British officials did not really know how to handle the question of native sovereignty; consequently they made faltering and inconsistent stabs at providing a solution whenever the question arose.

The Colonial Office did not follow up the one-sided proposals to cede jurisdiction made by the three chiefs. They were not officially accepted. Then in 1889 the Bechuanaland question became submerged in the question of issuing a charter to a company, the British South Africa Company, which wished to operate in the area, and the problem of the competency of the chiefs was sidestepped. The 1885 Order in Council was still in operation, at least in theory, over part of the "protected area" of Bechuana-land. But in practice little had been done to carry it out. Lord Knutsford acknowledged in July 1890 that no courts had ever been created in the area under the provisions of the order.<sup>108</sup> So the British government had failed to take advantage of the wide provisions of the Order in Council; and one reason for this failure was the confusion in legal theory about how much British jurisdiction could be exercised under the order. Legal interpretations had not definitely rejected an extended British jurisdiction; rather they left it in a position of open doubt. Out of three different sets of law officers within a period of six years, one had categorically denied that wide rights could be exercised over foreigners; the other two had approved it in theory but suggested limitations in practice. And so the Colonial Office hesitated to act forthrightly. The lack of legal clarity was reinforced by the possibility of diplomatic objection if Britain sought to control foreigners. The

108. Knutsford to Salisbury, July 3, 1890, C.O. 417/42/10939.

situation was arising where a practical injunction against action was turning into a legal prohibition.

In the third area of British protectorate influence—West Africa—the doubts and confusion evident in the South African cases were not evinced. Rather the approach of limited influence as taken in the Pacific case was repeated. Legal theory showed itself more settled and definite; it did not approve an easy extension of jurisdiction over persons other than British subjects unless sovereignty had been first established. The matter arose as an academic question out of the Berlin Conference of 1884–85 and the General Act which summarized the work of that conference. The discussions of this conference and its significance with respect to British protectorates will be discussed in the next chapter. In 1885 the Niger district was falling under British protection and the usual question was asked as to the extent of power that Britain could exert under the General Act over foreign subjects in these protected areas. The problem was further complicated by the request of the National African Company Limited for a charter to operate in the area. A decision was needed as to the limits of jurisdiction a private company could acquire under such a charter.

The powers desired by the company were widespread; they included the imposition of taxes and duties and the prohibition of foreigners. Lord Selborne, the lord chancellor, observed that the exercise of such powers would amount to an assumption of territorial sovereignty over the area. Accordingly he urged direct government by Britain; the crown should exercise such power, not a private company.<sup>109</sup> The law officers considered the charter scheme some months later and came to a similar conclusion.<sup>110</sup> They reported that it would be necessary to establish the sovereignty of Her Majesty over the territories if jurisdiction over the subjects of any civilized power was deemed necessary for the establishment and preservation of peace and good order in the area. They also added that the acquisition of sovereignty was

109. Memorandum, Selborne, March 3, 1885, F.O. 84/1879.

110. Webster, Gorst, Deane to Salisbury, August 8, 1885, F.O. 84/1879.

probably necessary for a second reason—the fulfilment by Britain of its international obligations under the General Act of the conference. The duties imposed on Britain concerned not only navigation rights by foreign powers but also the protection of foreign merchants and all the trading nationalities. In a protectorate such protection could not be obtained or exercised by Order in Council under the Foreign Jurisdiction Acts; and the lawyers pointed out that no alteration to this principle would arise through the transfer to a private company of whatever jurisdiction the crown might have in the area. Protection and the foreign jurisdiction legislation could not ensure a very complete control.

Since 1879, first in the Pacific and then in Africa, legal theory had been hardening against a ready and easy extension of the foreign jurisdiction system in the less civilized areas of the world. In the Pacific islands legal restrictions led to the continuation of a frustrating situation wherein no effective jurisdiction could be exercised over natives. In the case of New Guinea and part of Bechuanaland legal doubts and objections had helped determine the British government to settle upon a policy of annexation rather than to apply the too uncertain concept of protection. In the Niger basin legal limitations meant that only a restricted jurisdiction should be assumed if sovereignty was not established. The Bechuanaland case provided the greatest difficulty for the lawyers and showed most clearly the uncertainty, as well as the inadequacies, of British legal theory on protectorates. It is instructive to note that the greater flexibility in approach, giving approval to an expansive, effective, and rather comprehensive exercise of British foreign jurisdiction in the Bechuanaland protectorate, was espoused by the Liberal law officers—James, Herschell, Russell, Davey—whereas their Conservative counterparts took a more restricted and legalistic view of British power.<sup>111</sup> There is, however, nothing to suggest that either party's policy in colonial or foreign affairs determined its respective approach for political, as opposed to personal, reasons. The different directions seemed to be a matter of personal interpretation on

111. On James, Herschell, Russell, and Davey, see Appendix.

the part of the relevant law officer. During the late 1880s and the early 1890s the Conservative approach predominated; and this was reinforced by the decisions taken by the British government during the Berlin Conference of 1884–85 as to the nature of British protection.



## The Berlin Conference and European Protectorates

The hardening of legal theory during the 1880s was associated with new developments in the law governing protection and foreign jurisdiction that arose as a result of the discussions of the Berlin Conference of 1884-85. During this decade the over-all international scene was characterized by increasing contact among the European powers, as evidenced in the so-called "scramble for Africa." The hitherto largely unclaimed expanses of inner Africa were now being carved up. So soon as it seemed that the areas of interest of two or more of the participating European powers might intersect or overlap the respective governments had to decide how best to solve the possible conflict. The local governments or political structures of the Africans themselves were not considered of importance in offering any guidance to the solution; rather it was a matter for the European powers to decide between themselves. National pride and honor might push the issue towards the outbreak of open confrontation or conflict; a better answer was to discuss and negotiate the conflict of interests and arrive at a compromise. The Berlin Conference of 1884-85 met in the spirit of the second course of action, in the hope of avoiding direct clashes between the European powers. In origin, however, it was summoned for a more specific diplomatic purpose—to check British power, especially the way it seemed to be ever insinuating itself indirectly into the two great river basins of the Congo and the Niger.

It was obvious that such a conference would take primarily a practical approach—a matter of haggling and bargaining over rival interests. But it was also equally obvious that the problem involved considerations of theory—in particular of legal theory

pertaining to the rights of protecting powers, of sovereignty, of extritoriality, of navigation. The Berlin Conference was to be concerned not only with the settlement of competing claims of interest but also with giving a greater certainty to, and perhaps definition of, the power and authority of European powers in less civilized areas like Africa. If the European powers could mutually agree in theory as to their respective rights in such areas the chances of serious friction, perhaps even war, might be significantly reduced.

British legal theory on extritoriality had been developing a stricter interpretation of jurisdiction between 1879 and the time of the conference. But as shown above there was also quite an amount of confusion as to the fundamental principles and their application. At Berlin the British point of view came into contact with the German and French approaches which were somewhat different in principle and effect. So one result of this meeting of European minds at Berlin was that it highlighted the fact that Britain took a different view from Germany and France as to the authority and jurisdiction of a protecting power in a protected area. A second result, of legal importance, was that the conference helped to clarify British thinking on the matter, to remove the confusion and ambiguity that had been evident in the preceding years, and to fix future British thinking in one, settled direction.

By 1884 the scramble for the pickings of Africa was well under way. The Congo was opening up; Germany moved into Angra Pequena, Togo, and the Cameroons; France was active in the penetration of West Africa.

Meanwhile Britain was moving on two fronts—in the south British influence was moving northwards through Bechuanaland and in the west British protectorates were being proclaimed in the Oil Rivers and the Niger basin. Apart from the territorial interest in Africa European powers were becoming increasingly interested in the trading potential of the area. So the French and German governments, in the hope of clarifying some of the common, imperial problems by discussion, agreed upon the calling of an international conference at Berlin. Britain was invited,

along with Belgium, Holland, Denmark, Norway and Sweden, Austria-Hungary, Italy, Russia, Spain, Turkey, Portugal, and the United States.<sup>1</sup> There were a number of important African problems put on the agenda for discussion—the use of the Congo and Niger river basins; freedom of commerce and river navigation; and the clarification of the law concerning new occupations on the coasts of Africa. The original memorandum initiating the British invitation referred to *occupations nouvelles* (new occupations) but in the translation of the French into English confusion arose in the minds of the various speakers—British, French, German—and “annexation” and “occupation” were used almost interchangeably disregarding English legal technicalities differentiating the two words. From the very beginning of the conference the lack of clarity as to the scope of investigation—a fault which arose in part through the difficulty of translation—could probably have been taken as a warning that a discrepancy in approach would arise between different governments.

That section of the conference devoted to the discussion on the “formalities under which essential conditions to be observed in order that new occupations [*occupations nouvelles*] on the coasts of the African Continent” might be held to be effective was known as the Third Basis or Project of Declaration.<sup>2</sup> The German government, in arranging the agenda, provided only a loose framework on its scope. Count Münster, the German Ambassador at London, explained just prior to the commencement of the conference that the intention was to obtain agreement between the jurists and judges of the countries concerned on the established principles of international law that should be applied in future occupations. But the Germans failed to make clear exactly what was meant by *occupations* and they, in fact, took

1. For a general history of the conference, see Sybil E. Crowe, *The Berlin West Africa Conference, 1884-85* (London: Longmans, Green & Co., 1942); Arthur B. Keith, *The Belgian Congo and the Berlin Act* (Oxford: Clarendon Press, 1919).

2. See minute of conversation with Baron von Plessen, October 8, 1884, F.O. 84/1813; invitation, Plessen to Granville, October 8, 1884, [C. 4205], “Correspondence Respecting the West African Conference,” p. 5, P.P. 1884-85, LV; protocol No. 1, November 15, 1884, [C. 4381], “Protocols and General Act of the West African Conference,” pp. 3, 10, P.P. 1884-85, LV.

a wider meaning of the word than the British government:<sup>3</sup> the Germans included the concept of protectorates whereas the British interpreted the words *occupations nouvelles* as being restricted to new annexations. The British, in fact, showed some ambiguity as to the proper translation of the French phrase. For instance, the British acceptance of the invitation to attend the conference referred to "annexations of unoccupied territory." But, on most occasions, for example in instructions to the British delegation in Berlin, the direct translation, "future occupations," was recorded. Yet no attempt was made to give either practical or legal content to the phrase. It was not spelt out whether the strict legal sense of "occupation" was to be adhered to or whether annexations of any kind were to be comprehended within the phrase. As the conference proceeded the British delegation acted upon the latter interpretation but it is somewhat surprising that an early investigation of the translation and its meaning was not made so as to assist the delegation in fixing its point of view.

Up to this stage the Foreign Office had not ever clearly formulated its existing practice as to the manner of annexing territories. Now, with the prospect of an international conference where the legal views of various nations would be presented, it became necessary for the British system to be more specifically outlined. Accordingly, Edward Hertslet, the librarian of the Foreign Office, was asked to prepare a memorandum on the formalities that had hitherto been observed in making valid the occupation of territory.<sup>4</sup> Hertslet was regularly used for such tasks since he was custodian of the Foreign Office records and personally took an interest in the historical development of British foreign policy. He had already written *The Map of Europe by Treaty* and was continuing the editorial job for the two series, *British and Foreign State Papers* and *A Complete Collection of Treaties and Conventions* between Britain and other powers.

Hertslet investigated the background of a number of annexa-

3. Granville to Plessen, October 8, 1884, [C. 4205], "Correspondence Respecting the West African Conference," p. 7, P.P. 1884-85, LV; Granville to Malet, confidential, November 7, 1884, F.O. 84/1814.

4. Hertslet, see Appendix; memorandum on the formalities necessary for the effective annexation of territory, Hertslet, October 18, 1888, F.O. 84/1813.



tion problems. Concerning the manner of taking possession of an uninhabited island or district Hertslet found that previous British practice indicated that there was "no generally recognised form"; rather, a variety of procedures had been adopted. For example, in the recent British expansion into the Pacific in the 1870s there had been no uniformity of practice so far as applied to Fiji, the Lacedpede Islands, Chesterfield Island, and Laughlan and Prudy Islands. Furthermore, the law officers in a report in 1877 on the Lacedpede Islands declared that they were not aware of any formalities that were necessary to make possession and occupation of the islands absolute and indefeasible.<sup>5</sup> But they did go on to suggest new steps for the future.

A second question related to the operation of British law and practice in the case of continental annexations such as in Africa. Hertslet concluded that there was no general rule as to how far inland a coastal annexation extended. A general rule of international law existed on this problem but it suffered from the fact that although it was sufficiently explicit in formulation great doubt and difficulty arose whenever an attempt was made to put it into operation. The settled usage provided that the interior limit of a coastal settlement did not extend further than the crest of the watershed, while fixing the lateral frontiers was a matter of greater uncertainty.<sup>6</sup> Hertslet accepted this general approach that possession extended inland, including the navigable rivers. But such a claim was extremely vague. Again, on the question of the procedure to be adopted for the annexation of a coastline Hertslet could find no established practice. For example, it was not clear at how many points along the coast acts of annexation should be made. So far as the rights of natives were concerned Hertslet observed that from the example of the past it did not seem necessary on all occasions to obtain the consent of the natives to the annexing act. But he also confessed that the situation was becoming complicated because of the development of protectorates and their differentiation from annexations. In

5. Holker, Giffard, Deane to Derby, February 21, 1877, F.O. 5/1595.

6. See, for example, the formulations of international lawyers like William E. Hall, *International Law*, p. 91.



fact, Hertslet in this report was only beginning to skirt the real problem with which the Berlin Conference was to concern itself—whether there was an effective difference between annexation and protection. Hertslet's historical survey did not reveal satisfactorily the distinction between the two because up to that point the British approach had failed to take an exact line on this matter; one could hardly expect Hertslet, looking to the past, to find a difference if, in fact, British officials in their past actions had not drawn any clear distinction. So Hertslet's memorandum was useful primarily because it showed how unclear and confused existing British practice (and theory) was. Indeed Hertslet had to admit that there was scarcely any fixed law on these problems. Each annexation was unique, shaped by the particular facts pertaining to the situation.

The Colonial Office, known informally as the "annexing department," also had a memorandum prepared on the formalities of annexation and occupation. It was the work of Augustus Hemming, principal clerk in the African department.<sup>7</sup> Since he had no legal background he did not worry about legal details like Hertslet but rather took a practical approach; and, without any hesitation, he assumed that British practice was the regular and orthodox one. He observed that many annexations and protectorates made in West Africa had arisen from direct applications from the native chiefs and people to Britain; and, indicating how fair-minded Britain had been in this matter, he noted that on some occasions the application had been refused. The second method that had been used to establish British authority was by the negotiation of a formal treaty with the native chief who appeared most likely to hold sufficient power and authority; again, the British procedure had been quite proper because valuable consideration was given for the cession. For example, the chief would receive a stipend in return for any loss of authority or territory.

By contrast to British practice Hemming found the French position despicable. He criticized French traders for obtaining treaties fraudulently—either using compulsion or playing upon

7. Memorandum on proposed Conference on West African affairs, Hemming, October 16, 1884, F.O. 84/1813.

the ignorance of the natives. "A French trader obtains from a native chief probably in consideration of a bottle of rum or a trade gun and some powder his signature to a document which he does not understand." This evil was then compounded by the action of the French government in accepting the document as a legal cession and in then sending a man-of-war to hoist the French flag. The trader, for his efforts, was made the agent of the government and French rule was instituted—simply and without regard to legal rules or procedure. Lister, in the Foreign Office, agreed with Hemming's criticisms of the French. Their practice was to claim protectorates "on the strength of tricolor handkerchiefs given to natives to stick up wherever they please."<sup>8</sup> One should note, however, that such self-righteousness on the part of the British was not fully justified. One might well wonder how different British practice was from French in the Niger basin; Lord Granville, as foreign secretary in 1884, gave the National African Company a somewhat free hand to hoist the British flag and declare a British protectorate at all stations that it held or might in the future receive.<sup>9</sup>

These preconference considerations of British procedures indicated that the law was very confused, that practice was variable, and that neither the Foreign Office nor the Colonial Office had made a very serious attempt to rationalize and standardize the British approach. Each department approached an annexation problem on an ad hoc basis having little regard either for theory or for consistency in practice. The calling of the conference was seen as presenting a useful opportunity for bringing some order and uniformity in both British and international theory and practice. The British delegation sent to Berlin was comprised of policy-makers in the Foreign Office and the Colonial Office. But Sir Travers Twiss was also added to help in legal and theoretical matters. Granville recommended him as a man "well acquainted with the subject" and with "great experience as a jurist especially in questions of International Law."<sup>10</sup>

Twiss was an outstanding British jurist. For three years, be-

8. Minute, Lister, October 14, 1884, F.O. 84/1813.

9. Granville to Aberdare, November 12, 1884, F.O. 84/1814.

10. Twiss, see Appendix; Granville to Malet, November 14, 1884, F.O. 84/1814.

tween 1852 and 1855, he had held the chair of international law at King's College, London and then in 1855 succeeded Joseph Phillimore, a very distinguished jurist, as Regius Professor of Civil Law at Oxford.<sup>11</sup> In 1856 he published *Two Introductory Lectures on the Science of International Law*; and his major publication appeared in two volumes between 1861 and 1863—*The Law of Nations Considered as Independent Communities*. This became a very influential general text on international law. He contributed to the *Revue de Droit international* and published on a number of current international problems—the Oregon question, Schleswig-Holstein and the Germanic Confederation, Hungary. He took an interest in problems of foreign jurisdiction and published his opinions in 1880 in *On Consular Jurisdiction in the Levant, and the Status of Foreigners in the Ottoman Law Courts*. He assisted the government in matters of international law, first as Admiralty advocate-general and then as the queen's advocate-general. This office he resigned in 1872 following a scandal and law-suit involving his wife. His reputation was known in Europe because, apart from his *The Law of Nations*, he had assisted the king of the Belgians in preparing a constitution for the Independent Congo State. He was also a member of the Institute of International Law, and of the Association for the Reform and Codification of the Law of Nations. In all, Twiss seemed a good choice to assist the British delegation at the Berlin Conference.

The first detailed formulation of the Third Basis was made during December 1884. Twiss immediately raised objections to it primarily along the line that he wanted to avoid a strict statement of formalities.<sup>12</sup> He considered that there was no general answer to the problem and, accordingly, any formalities should be left optional. He called the draft proposal "sumptuous scaffolding and upper story with no ground floor." And he warned that the arrangements being discussed would apply not only to the Congo and Africa but also to the East. He was sounding a

11. *Dictionary of National Biography*.

12. Memorandum. Twiss, December 19, 1884, Twiss to Pauncefoot, December 20, 1884, F.O. 84/1818.

warning to the government that the adoption of strict formalities with regard to expansion might unnecessarily hinder future imperial designs. His approach fitted in well with a typical model of British thinking—to avoid a strict definition of the situation and instead to decide and settle each problem as it arose on the merits of each situation. Twiss also raised queries about the extent of territory that could be claimed as appurtenant to an actual settlement. On one point, however, he moved in favor of the draft formulation; he agreed that notification of the fact that possession had been taken over vacant territory by a Western power should be given to the other foreign powers participating in the conference.

The Foreign Office thought that the formulation and Twiss's objections were of sufficient importance to warrant examination by its legal advisers in London. Both the law officers and the lord chancellor were briefed on problems arising from the Third Basis and although the former made reports on all the references it was the lord chancellor who took charge of the issue. There was, in fact, no basic disagreement between the two legal sources, the law officers doing most of the spade-work for the lord chancellor; but, not surprisingly, the government took more heed of its cabinet colleague since he was able to approach the problem from a wider perspective. The normal procedure was that as soon as the information arrived from Berlin, Herschell, the solicitor-general, would prepare a draft opinion; then James, the attorney-general, would agree with it and pass it on to Selborne, the lord chancellor. He would consider the information and draft and write his own memorandum making further comments. And meanwhile the law officers would prepare their formal report. Speed was of the essence in these references since an urgent reply was needed by the delegation at the conference table and unusual haste was shown by these legal advisers in the handling of the references.

The law officers approved broadly the position adopted by Twiss.<sup>13</sup> They immediately excluded consideration of the for-

13. Draft, Herschell, January 2, 1885, final report, James, Herschell, Deane to Granville, January 7, 1885, F.O. 84/1819.



malities involved in the establishment of a protectorate since they conceived that the scope of the Third Basis was limited to *occupation*, by which they understood annexation. So they devoted their attention to the legal acquisition of sovereignty—by conquest, cession, and occupancy or settlement. Indeed they thought that only the latter method, by occupancy or settlement, was intended under the Third Basis. On this score they had few helpful suggestions to make; the report pointed to the difficulties in fixing formalities and urged that more information be obtained from the Colonial Office on current practices. They agreed with Twiss on the problem of defining the limits of vacant territory adjacent to a territory. Briefly, the law officers' report provided little assistance in the settling of official policy; it appeared rather jumbled and confused. But it was of some advantage in that it summarized problems associated with the Third Basis and it did narrow the scope of investigation to annexations (excluding protectorates).

It was Lord Selborne, the lord chancellor, who took a definite stand on the implications of the Third Basis and sought to determine the course of British policy. He built upon the points raised by the law officers but approached the problem from a wider and more comprehensive angle. He strongly condemned as inexpedient for British interests the proposal that new rules and definitions of international law should be settled with respect to annexations and protectorates. Taking a practical point of view he observed that "the world has gone on, until now, well enough, without them: and the questions are, in their own nature, such as hardly admit of solution on mere abstract grounds, without reference to the particular facts."<sup>14</sup> Such rules of international law as existed on questions of annexation were quite vague. He gave as an instance the rule relating to the interior extension of territory from a coastal settlement; such claims he saw as "pretensions" of "extravagant latitude" yet he did not believe that a more exact rule had been or could be devised by the jurists.

The most significant part of his memorandum referred to the

14. Note, Selborne, January 3, 1885, F.O. 84/1819.



distinction between annexations and protectorates. Selborne drew out this distinction as being crucial to the issues being discussed in Berlin. The law officers, in their report, had adverted to the distinction but had done so only in passing. Selborne's emphasis on this point highlighted an important, underlying assumption affecting the whole British approach to the problem. Selborne took his ammunition from a memorandum prepared in 1883 by Hertslet on the nature of protectorates.<sup>15</sup> Now the lord chancellor used part of Hertslet's formulations for the purposes of definition:

Annexation is the direct assumption of territorial sovereignty. Protectorate is the recognition of the right of the aboriginal, or other actual inhabitants, to their own country, with no further assumption of territorial rights than is necessary to maintain the paramount authority and discharge the duties, of the Protecting Power.

Although the definition left a number of points undefined the very fact that it had been made, and by the leader of the legal profession, was to have a profound effect upon the future development of official attitudes towards protectorates and the amount of jurisdiction that Britain could assume therein.

The intent of Selborne's statement was that annexations only (excluding protectorates) should be discussed at the conference. This limited stand drew unfavorable comment—in Berlin, and in the Foreign Office. Malet, one of the British negotiators, saw the distinction between the two kinds of territorial claims as "captious."<sup>16</sup> At this stage the British delegation was trying to come to agreement with the Germans and the French on a common basis of notification of *occupation* and the exercise of jurisdiction. Selborne's objections frustrated any such meeting of minds. Likewise Pauncefote was distressed by the lord chancellor's objection to the inclusion of protectorates.<sup>17</sup> He felt that the proposed formulation would prevent the creation of "paper protectorates"; if a number of duties were cast upon the protecting power it would not be so inclined to mark out a rash of protector-

15. Memorandum, Hertslet, April 24, 1883, F.O. 84/2275.

16. See note, Selborne, January 8, 1885, F.O. 84/1819.

17. Pauncefote to Hill, January 9, 1885, F.O. 84/1819.

ates all over the globe. For diplomatic reasons also Pauncefote was willing for Britain to follow the German and French lead: "I fear we shall be roundly abused for our opposition and obstructiveness." So Pauncefote was prepared to liken protectorates to annexed territory, to assume very full responsibilities, almost as many as those involved in annexation.

Twiss, however, had some sympathy for the lord chancellor's arguments.<sup>18</sup> He appreciated the distinction between protectorate and annexation and understood the intention of the lord chancellor and the law officers. He agreed that the drift of the Third Basis was to treat protection as a "*veiled* sovereignty, carrying with it the same paramount rights as *avowed* sovereignty." One consequence of this was that a protecting power would acquire the same rights and obligations over foreigners as a sovereign power had over foreigners within its territory. He warned that many problems would arise if "the new fangled protectorates are to come into fashion in the place of annexations." Their status in time of war would create many problems; for instance, could they be regarded as neutral coaling stations? "Protection' is a honeyed word but a honeyed edge of the cup does not guarantee the contents of the cup to be innocent." With the prospect of such difficulties arising in the case of a protectorate being treated as a special category, Twiss suggested for practical reasons that it might be sensible policy to "tear away the veil" from these new protectorates and to affirm that the protecting power virtually had the full power of a sovereign.

The lord chancellor took up the issue further. He would not yield to the continental approach or to the brandishments of Malet and others at Berlin whose main concern was to ensure that a basis of negotiation was quickly established, even at the sacrifice of some principle. He stated that it was "eminently undesirable" to lay down a principle which would turn every protectorate into an annexation.<sup>19</sup> It would create innumerable, practical problems in areas like Afghanistan, Zanzibar, and Egypt where Britain was increasing its influence. The undertaking of

18. Twiss to Pauncefote, January 10, 14, 1885, F.O. 84/1819.

19. Note, Selborne, January 11, 1885, F.O. 84/1819.

such responsibility would not only be inexpedient but also unjust to the actual rulers and inhabitants of the protected countries. Selborne warned that in a place like New Guinea immense obligations would be imposed on Britain if she were to become answerable for all actions the natives might take against any foreigners. Courts and magistrates would have to be established in all protectorates to assume a full jurisdiction over all wrongs against foreigners. Pauncefote had taken the view that the agreement reached at the conference would apply only to Africa which was, in fact, the most obvious and direct interpretation of the Third Basis. Now Selborne pointed out how dangerous and fallacious it would be to assent to rules applying to Africa without being prepared to admit their application elsewhere in the world. Such a plea for consistency seemed well within the spirit of the conference since it had been called originally to establish some principles of uniformity in practice. Selborne was acting not only as legal adviser but also as guardian of Britain's imperial interests and he wanted the government to be fully aware that British interests might be greatly disadvantaged by agreement to the principles being formulated primarily by continental interests. Ever since the opening of the Suez Canal the eastern seas had been a matter of practical politics and it was only reasonable to assume that the East would be treated in the same manner as Africa.

At this stage the lord chancellor's authority carried the cabinet. Lord Granville, the foreign secretary, assured him "we shall scrupulously follow your advice but it may be as well to let you know that Pauncefote is rather unhappy."<sup>20</sup> Gladstone gave his support to Selborne over the matter of limiting Britain's direct and positive responsibilities in protectorates.<sup>21</sup> But the Germans kept insisting on the need to provide some means whereby foreigners could obtain justice in protectorates. Malet complained that the British delegation was finding itself isolated and he urged that concessions be made by Britain.<sup>22</sup> Britain's objection

20. Granville to Selborne, January 10, 1885, P.R.O. 30/29/141 Granville MSS.

21. See Selborne to Granville, January 20, 1885, F.O. 84/2275.

22. Malet to Granville, January 21 and 22, 1885, F.O. 84/1820.

to the assumption of more complete responsibility in protectorates was being interpreted by the European powers as being further proof of a grasping, imperial policy, that Britain wanted to be free to establish paper protectorates everywhere. The other European powers sided with the German approach and if Britain remained intransigent the likely outcome of the conference would be a moral and diplomatic defeat for Britain at the hands of Count Bismarck. Meade and Hemming, the two secretaries from the Colonial Office assisting the Berlin delegation, argued that Britain should undertake the kind of responsibilities contemplated. They pointed out that the obligations which the Germans sought to impose were no greater than those already admitted and acted upon in British protectorates, like the protected areas around Lagos and elsewhere in West Africa. Furthermore, even where sovereignty was proclaimed Britain did not immediately undertake a spree of administrative and judicial activities. For example, in the colony of Sierra Leone there were extensive districts along the coast and inland where Britain had not established administrative or judicial plant.

Meade privately wrote a protest to Granville for whom he had once served as private secretary.<sup>23</sup> He feared that the discussion was falling "into too exclusively a legal groove. The legal arguments may from a lawyers point of view, be sound enough, but I hope that you will take care that the political side of the question is not overlooked." The conference was already close to breaking down because of the British stand. Foreign representatives felt that Britain had "some dark policy" which it was concealing from the rest of Europe. And Meade wondered why Britain could not now take an agreeable attitude; so many attempts had been made to find a compromise on the Third Basis that it was "so watered down that it really means little or nothing." The lawyers' approach was condemned as too academic and divorced from reality. The lawyers seemed to think that an elaborate system of justice and administration would have to be set up under the new proposals. But Meade thought otherwise: "Protection

23. Meade to Granville, January 24, 1885, P.R.O. 30/29/147 Granville MSS.



does not involve a policeman and a magistrate at every few miles of coast, with courts of law and regular sessions at very frequent intervals as in thickly populated old established countries." Action would be required only in obvious cases; for example, if natives plundered a wrecked ship British authorities would be expected to punish the plunderers or obtain restitution from the chiefs. Protection would be offered to traders who congregated in a convenient port but this could not be guaranteed if they went into isolated areas in the interior. Malet carried these practical objections to the lord chancellor's stand further by differentiating between protectorates. The type of protectorate that could be created in Egypt, Zanzibar, or Afghanistan was quite different from those being created in most of Africa. In the former case there already existed established governments and consequently there was no need for the protecting power to interfere in the internal administration of the area. The protecting power could interfere if it chose to do so but Meade added: "The less the protecting power does so, the better for all parties." Furthermore, Meade was backed up by concurrent, practical developments in one of the protected areas. In the case of New Guinea he observed that the recent trend of British policy was that "we are dropping vague protectorate with its shadowy rights and duties and assuming the direct sovereignty." And there was a second aspect to the New Guinea example which supported Meade's line of argument. He pointed out that even under the existing protectorate Britain was "already exercising authority more fully" than was being contemplated under the Third Basis. The instructions issued to the special commissioner for New Guinea forbade any acquisition of land by white settlers; this was a significant exercise of authority in internal administration for a protecting power.

Criticism was also growing in the cabinet. The home secretary, Harcourt, who had a considerable reputation in international law, disagreed with the lord chancellor.<sup>24</sup> He relied on both political and legal grounds. The British stand was inexpedi-

24. Minute, Harcourt, January 24, 1885, F.O. 84/1820.



ent, it would allow the creation of paper protectorates, and it would set all of Europe against Britain. On principles of international law he argued that since a protectorate by its very meaning carried a right to exclude other powers from the protected territory, it involved of necessity the obligation to do for other powers what they could otherwise do for themselves; so Britain had an obligation to protect the rights and subjects of a foreign power in a protectorate.

In the face of these growing pressures Selborne, although maintaining the correctness of his objections, agreed to acquiesce—on certain conditions.<sup>25</sup> But he was not happy with the situation. He saw it as a struggle between politics and principles, between the immediate interests of diplomacy and the long-term consequences of British imperial power.

It is evident (and perhaps it may not be unnatural) that our diplomatists at Berlin place the smooth working of the Conference which is going on there upon a higher level than all other considerations connected with the question at issue. It is perhaps equally natural that I should place the principles involved, and the possible future consequences of a false step upon this occasion, upon a higher level than the temporary considerations connected with our being, or not being, in minority of one at the Conference.

But he would relent, if the Foreign Office insisted and if Gladstone and his cabinet colleagues agreed. Any agreement entered into must make it clear that Britain did not recognize that a universal obligation was being created in all cases of protectorates; nor would Britain be obliged to establish jurisdiction or authority in its African protectorates. And he added a practical warning, "strictly confidential," that Germany and France "are much more certain to exact from us the fulfilment of any obligation which we may undertake, than loyally to fulfil towards us the like obligation themselves." He also highlighted the fact, quite correctly, that there was a very important distinction between protectorate and annexation in British theory which did not exist in the French and German cases. For those countries protectorate was

25. Selborne to Pauncefote, January 18, 1885, Selborne to Granville, January 20, 1885, F.O. 84/2275; Selborne to Pauncefote, January 23, 1885, F.O. 84/1820.

annexation under another name. This was not so in British theory partly because the protectorate had been developed as a useful device for the assumption of wide powers to control the slave trade in Africa without the necessity of accepting the full load of responsibilities associated with annexation.

Having obtained this legal concession the cabinet proceeded to approve a vague French formula which had been suggested as a last-ditch compromise. But at the very time that Malet was instructed to approve that compromise the German government changed course and suddenly approved Selborne's primary stand. It agreed to omit all mention of protectorates from the section defining the obligations to be imposed on the European nations making future occupations on the African coast.<sup>26</sup> The reason for this *volte-face* is not clear. At one stage during the discussions on the Third Basis Bismarck had told the British delegation that he did not attach much importance to this section of the conference; his primary interest was to obtain declarations of freedom of commerce and of navigation. Yet in the days following that admission Bismarck had refused to give way to Britain's intransigent position. Bismarck may, of course, have been playing a political game, trying to discredit and embarrass Britain as much as possible in the eyes of the other conference powers. On another occasion, also, Bismarck had taken a rather offhand approach to the question. He saw it as a language problem in which there were such differences in meaning that the German, French, and English vocabularies could not offer a sufficient definition on which agreement could be reached. Throughout the discussions, however, the French delegates had tried to keep the matter alive with substitute proposals. It is possible, of course, that Bismarck swung around to the British view because he came to realize that Germany might benefit in its colonial expansion if the matter of obligations in protectorates were left loose. Germany could create paper protectorates as easily as any other power.

Agreement was finally reached upon Selborne's terms and em-

26. Malet to Granville, January 28 and 29, 1885, F.O. 84/1820.

bodied in the General Act of the Conference of Berlin, 1885. Article 35 provided:

The Signatory Powers of the present Act recognize the obligation to insure the establishment of authority in the regions occupied by them on the coasts of the African Continent sufficient to protect existing rights, and, as the case may be, freedom of trade and of transit under the conditions agreed upon.<sup>27</sup>

The agreement applied only to occupied or annexed territory and not protectorates. The obligations to establish authority imposed on the European powers were suitably vague and indefinite. British interests would not suffer as a result of the application of a general rule.

A second aspect of the Third Basis was approved with little discussion or dissension. This referred to the duty of notification of the future establishment of European interests in Africa. This agreement, which became Article 34 of the General Act, included protectorates as well as annexations and provided that any conference nation taking possession of the African coast or assuming a protectorate there should notify the other nations of its action. Those other nations would then be able to make good any claims of their own. In arriving at this agreement Britain was not so successful in pressing legal points. The law officers, Selborne, and Twiss all urged that the notification should define the extent of the territorial claims.<sup>28</sup> This was rejected. Likewise the British desire that the rules apply to all Africa and not just the coast was rejected.<sup>29</sup>

In winding up the conference, Bismarck, ignoring or glossing over his earlier doubts, hailed the Third Basis as an important step introducing "a new rule into public law."<sup>30</sup> Its intent was to remove causes of misunderstanding and dispute from inter-

27. "Protocols and General Act of the West African Conference," [C.4361], p. 312, *P.P.* 1884-85, LV.

28. Twiss to Pauncefote, December 20, 1884, F.O. 84/1818; James, Herschell, Deane to Granville, January 7, 1885; note, Selborne, January 8, 1885, F.O. 84/1819.

29. Report of Commission, January 29, 1885, "Protocols and General Act of the West African Conference," [C.4361], p. 213, *P.P.* 1884-85, LV.

30. Bismarck, February 26, 1885, "Protocols and General Act of the West African Conference," [C.4360], p. 301, *P.P.* 1884-85, LV.

national obligations. But, in truth, not very much had been achieved in the way of positive rules. As Malet observed:

the effect of this decision is that no attempt is made by the Conference to interfere with existing maxims of international law; dangerous definitions have been avoided, and international duties on the African coast remain such as they have been hitherto understood; the only stipulated requirement, that of notification, being rather an act of courtesy than a rule of law.<sup>31</sup>

This summary of the effect of the discussions was correct, at least on the surface. But Malet failed to appreciate or underestimated underlying significances and assumptions that surrounded the whole course of the discussion. He was looking only at the end product, the wording of the General Act. As Selborne had suggested, the European powers, although not obliged to do so, did tend in future cases to apply the rule not only to the African coast line but elsewhere in Africa and in the rest of the world where protectorates and annexations were being established. The notification rule was not difficult to apply and the use of it all over the globe probably did help in minimizing conflicts between the rival claims of the imperial powers.

The greatest significance of the Third Basis of the conference lay in policy considerations rather than in the fixing of legal rules. The conference drew to the attention of British administrators and lawyers the important differences that existed in the theory of protectorates between Britain on the one hand and Germany and France on the other.<sup>32</sup> And this disharmony was relevant in the operation of British administrative and imperial policies. As a result of the conference British ideas on the nature of a protectorate and its responsibilities there became more clear and this was true both for legal authorities and for imperial administrators. Future British administration in protectorates

31. Malet to Granville, February 21, 1885. "Correspondence with Her Majesty's Ambassador at Berlin Respecting West African Conference," [C.4284], p. 4, *P.P.* 1884-85, LV.

32. Crowe, *West Africa Conference*, pp. 3-5, likewise underrates the significance of the Third Basis and the conference in general. She points out that all the regulations failed in their purpose. But her emphasis lies in a consideration of significance so far as concerns the study of international law and international relations. She does not consider its significance from a local, British point of view.



would be guided by the principle of the assumption of minimum responsibilities, even in matters concerning jurisdiction over foreigners. So long as there was a firm division between annexations and protectorates the latter would almost certainly be allowed to arise out of the particular, local circumstances and no attempt would be made to provide a fixed definition of the nature of a protectorate or a list of uniform responsibilities that would devolve upon the protecting government. The conference had made the British mind more certain that each protectorate was vague and rather unique.

The lord chancellor had played the dominant role in this development of British attitude. He, more than any other person, lawyer or administrator, had the most definite concept of a protectorate and through dogged presentation of his version he was finally able to gain acceptance. Much of his reasoning was not strictly a matter of law but often involved practical, political, or diplomatic considerations. He was concerned to protect Britain's interests and in 1884-85 these revolved around the fact that Britain was the largest colonizing nation. Consequently it was wise administrative policy for Britain to avoid the assumption of onerous responsibilities in all of its colonial enterprises. The line that Selborne espoused was practical and expedient in that a protectorate was taken to involve very limited responsibilities.

The conference had shown the British that their approach differed from that of the continentals; yet the British lawyers and administrators were not very clear about the nature of foreign protectorates. The latter seemed close to annexations but whether or not they were full annexations the British did not really know or understand. Selborne himself, when drawing the distinction between the two kinds of protectorates, revealed that he was not very acquainted with the details of a German protectorate.<sup>33</sup> For example, it seemed to him that even if the Germans did virtually equate protection and annexation this did not impose on them duties to tackle slavery such as would arise if Britain took the same attitude. As it was he did not know what

33. Selborne to Pauncefote, January 23, 1885, F.O. 84/1820.



obligations a German protectorate imposed on the home government.

Even while the Berlin Conference was in session discussing the protectorate proposals a question arose in London as to British responsibilities in the Niger River basin. British penetration of this area centered on two points—to the west of the Niger River the coastal strip at Lagos had been annexed in 1861 and a fringe of protected areas developed around that center. But the mouths of the Niger River—parts of which were known as the Oil Rivers—had also been of interest to British traders since mid-century. British consuls entered into vague treaties concerning trade and slavery with chiefs along the coast, and British stations were set up. Soon, however, the traders were looking inland and sailing up the Niger in search of more palm oil. By the 1870s a number of British firms were trading in the area.<sup>34</sup> Then, in 1878, the position was complicated diplomatically by the intrusion of French interests. French traders and gunboats entered and the French commercial position was strengthened by the creation of one company amalgamating the earlier firms. In reply to this challenge, George Goldie, a commercial entrepreneur, was determined to consolidate British interests and to make them predominant in the area. Since 1877 he had been amalgamating British firms on the Niger and in 1882 he reorganized the operation under a new company, the National African Company. His intention was to obtain a Royal Charter for the company with the purpose of obtaining official backing for the exclusion of any other competition.

The British government was concerned about increasing French interest in the area but it took its time in deciding on a policy. The Colonial Office resolutely set its face against any annexation in the area. Finally, after a great deal of debate between that department, the Foreign Office, and the Treasury, the cabinet decided in November 1883 that a protectorate should be

34. For general background see K. O. Dike, *Trade and Politics in the Niger Delta, 1830-1885*, chap. xi; John E. Flint, *Sir George Goldie and the Making of Nigeria* (London: Oxford University Press, 1960), chap. ii; J. C. Anene, *Southern Nigeria in Transition, 1885-1906; Theory and Practice in a Colonial Protectorate* (Cambridge: Cambridge University Press, 1966), chap. ii.

established over the Cameroons, the Oil Rivers, and the Niger mouths. The protectorate solution offered the obvious advantage that it was cheap for the British government yet could both protect British trading interests and exclude rival, European claims. Accordingly during 1884 the local consul set about obtaining treaties with the chiefs along the coast and the Niger River. The basic form of treaty used was that concluded with the kings and chiefs of New Calabar on 4 July 1884.<sup>35</sup> Under this treaty Her Majesty offered her favor and protection and the kings and chiefs agreed not to enter into any correspondence, agreement, or treaty with any foreign power. Article 3 provided:

It is agreed that full and exclusive jurisdiction, civil and criminal, over British subjects and their property in the territory of New Calabar is reserved to Her Britannic Majesty, to be exercised by such Consular or other officers as Her Majesty shall appoint for that purpose.

The clause also stated that this jurisdiction was to be exercised over "foreign subjects enjoying British protection" (but note that such persons were a very restricted category as will be explained later). Other clauses of the treaty concerned the settlement of disputes, relations between the kings and chiefs on the one hand and the consul on the other, trading and religious rights, and control over wrecks. In the following months—and through into early 1885—over one hundred such treaties were signed with individual variations for each case. But the first three clauses were almost universal. Meanwhile, since the beginning of 1884, the National African Company had been concluding treaties with many of the chiefs along the river. These were more complete in their grants than the treaties prepared by the British government. With the company treaties the chiefs ceded the whole of their territory and granted numerous other rights.<sup>36</sup> Goldie strengthened the company's position further by buying out the other French companies that had been in competition in the area. These negotiations he completed just before the Berlin Conference met. So a dual position was created. On the one hand

35. Hertslet, *Treaties*, XVII, 131.

36. E. Hertslet, *The Map of Africa by Treaty* (3rd ed.; London: His Majesty's Stationery Office, 1909), I, 131-54.

the British government was establishing a sufficient number of protectorates along the coast and up the Niger to indicate a predominant British influence in the region. On the other hand the National African Company was entrenching itself as the only effective authority in the region and was acquiring sovereign rights. In the absence of any authority being actually provided by the British government the company had become the "quasi-official representative" of Britain.<sup>37</sup>

The British government and the company had yet to define legal relationships in the area and the extent of authority that either party could exercise. The company wanted to strengthen its position as the only effective authority. Lord Aberdare, chairman of the company, wrote to Granville at the Foreign Office:

In fact the Company is taking such properties and occupying such a position in these vast and distant regions as to impose on it the absolute necessity of a stronger organization than they possess as a mere commercial association, and this can best be done through a Charter.<sup>38</sup>

The Foreign Office saw obvious advantages in the granting of a charter. Lister was concerned by the trend of events, especially with the pressure being applied by Germany through the conference. "It is very important to maintain British supremacy on the Niger. . . . I entirely agree that our position requires strengthening."<sup>39</sup> A charter was preferable to annexing or even protecting the territory and although it was admitted that a charter did not bestow an assumption of sovereignty it would add significantly to the company's power. The problem over sovereignty arose through the cession of wide, "sovereign" powers to the company by the chiefs, but this transfer was relevant only between those two parties. So far as concerned the government's position the company could not assert sovereignty over that of the crown.

The company's hold over the area was of great advantage to the British government in the Berlin Conference. Because of the

37. Flint, *Goldie*, p. 68.

38. Aberdare to Granville, October 1, 1884, P.R.O. 30/29/148 Granville MSS.

39. Minutes, Lister, October 3, 1884, P.R.O. 30/29/148, ca. December 21, 1884, P.R.O. 30/29/195 Granville MSS.

commercial and territorial stranglehold arranged by Goldie the British government was able to tell the European powers that British control over the area was virtually complete and that effective occupation, as opposed to mere occupation, was being exercised through the operations of the company. So a predominant British influence in the region could be asserted as against the claims of other countries. But, given such singleness of control, Britain had to accept that a number of responsibilities devolved upon the government to provide for some administration, justice, and general peace and order. This fact was further confirmed by the Berlin Conference. The Foreign Office acknowledged this: "As a result of the West African Conference considerable responsibilities devolve upon Her Majesty's Government in the Lower Niger."<sup>40</sup> And so a decision had to be reached on the most suitable method of asserting British authority.

The Foreign Office was divided about the grant of a charter. This arose partly because it was not clear how much power a chartered company could exercise in the Niger case. On grounds of expediency and of financial saving to the government Lister pressed for the grant of a charter.<sup>41</sup> But legal opinion did not run with him. Pauncefote took a more imperialistic line in the sense that he wanted to ensure no doubts could arise about the legal establishment and assertion of British authority. "If we want to keep our own politically and internationally in the Niger, our rule over the communities there must be imperial and direct."<sup>42</sup> He meant that although the government might use the company to carry out British administration British power and authority could not be transferred to a private company. Those political and territorial rights that the company had already from the chiefs would have to be transferred to the crown. Pauncefote saw the case as one following the regular system of foreign jurisdiction. The territories could be governed by Order in Council under the Foreign Jurisdiction Acts. Pauncefote thought the whole matter of the grant of a charter was one worthy for the

40. Granville to Derby, January 6, 1885, C.O. 96/170/325.

41. Minute, Lister, January 30, 1885, F.O. 84/1879.

42. Minute, Pauncefote, February 7, 1885, F.O. 84/1879.



consideration of the law officers. Granville agreed with him, as did other members of the cabinet, including the colonial secretary and the chancellor of the Exchequer.<sup>43</sup> "Our first step should be to know what we can legally do by a Charter." Granville also considered that the lord chancellor should be approached for an opinion.

Now the full force of legal sanctions was brought to bear on the question of sovereignty and the granting of a charter. Lord Selborne made it clear: "This proposed Charter ought not to be granted."<sup>44</sup> He raised questions as to the "alleged" cessions by the chiefs to the company. He wanted evidence that the cessions were "rightful and legitimate transactions" entered into by the kings, chiefs, and people with full knowledge of their effect. Furthermore, it had to be established that the persons signing away the territory had a good right or title to it. Selborne further wondered how the crown could give the company such *carte blanche* authority to enter into such transactions. The rights that the company was claiming to exercise and that the crown was asked to authorize in the charter were very wide—to exercise territorial dominion, to administer justice, to impose duties and taxes, to prohibit foreigners—and Selborne thought these claims were consistent with an assumption of territorial sovereignty; yet, the government's intention seemed to seek to avoid such an assumption. Overall, the lord chancellor considered that the powers and privileges that the company was expecting the crown to approve were more than the latter could rightfully claim for itself in the area. The claims were rooted upon the existence of territorial sovereignty, upon powers of control which made the British government responsible for the actions of all people—British subjects and foreigners—in the area. Yet, the British government had not acquired such control. Selborne went on to distinguish the Niger case from that of the East India Company and the Borneo charter.

Again the solution to a problem of imperial expansion was

43. Minute, Granville, February 25, 1885, F.O. 84/1879.

44. Memorandum, Selborne, March 4, 1885, Kimberley, March 7, 1885, Pauncefote, March 5, 1885, F.O. 84/1879.



being frustrated partly by the raising of the question of jurisdiction over foreigners. And the lawyers held a consistent line. If the assertion of control over foreigners was sought, territorial sovereignty needed to be established. If the charter was not intended to establish sovereignty, only a lesser control, excluding foreigners, could be exercised. Granville thought the best course was to declare a protectorate; Kimberley, in the Colonial Office, warned against declaring sovereignty because it would raise very serious difficulties about slavery; and the cabinet went along with such advice.<sup>45</sup> Pouncefote considered that his stand had been vindicated against the demands of the company. He urged: "There is but one course to pursue—take immediate measures for placing the territories under the protection of the British Crown by *Treaties between the native chiefs and the Queen*." But Pouncefote went astray in his legal understanding of a protectorate. He claimed that if his course of action was adopted Britain would acquire full jurisdiction over natives and foreigners alike. In coming to this conclusion he relied upon the example of the German claims to some of the East African coast off the island of Zanzibar. Late in 1884 Carl Peters had staked out German claims in the area and a charter was granted in early 1885. But with such an argument Pouncefote was forgetting the difference in law and in practice between Germany and Britain; and this was the very point that the Berlin Conference had just finished discussing.

The government proceeded with its policy of proclaiming a protectorate. On June 5, 1885, a Notification of British Protectorate over the Niger Districts appeared in the *London Gazette*.<sup>46</sup> The territory specified included but was larger than the areas covered by the treaties entered into by the National African Company. It was also stated that measures were being prepared for the "administration of justice and the maintenance of peace and good order" in the Niger districts. But with regard to these duties there existed a divergence of approaches between that of

45. Minutes, Granville, March 4, 1885, Kimberley, March 7, 1885, Pouncefote, March 5, 1885, F.O. 84/1879.

46. Hertslet, *Treaties*, XVII.

Pauncefote and that of the company. The former thought along the lines of an ordinary protectorate situation—using a high commissioner and, for cheapness and convenience, employing officers of the company to carry out the government's responsibilities. But the company thought otherwise; Goldie and Lord Aberdare wanted to proceed with their original scheme for a grant from the queen of a charter conferring on the company full powers of government over their treaty territories. In June 1885 the Liberal government fell and the company renewed its proposals with Salisbury, the new foreign secretary.<sup>47</sup> It was decided that the whole question of the grant of a charter should be referred for a further legal opinion. The draft charter for the company had been prepared by Hardinge Giffard, who was now the lord chancellor of the new administration.

The law officers made an overall favorable report on the grant of the charter.<sup>48</sup> This was on the basis that the Foreign Jurisdiction Acts allowed the crown "the most ample discretion" as to how power and jurisdiction might be exercised in areas like the Niger. There was no restriction upon the crown granting to a chartered company all the power and jurisdiction that the former might have acquired by treaty, usage, or otherwise. But the legal advisers also pointed out that the precedent usually adopted was for officers directly responsible to the government to exercise such authority. The most important part of the report so far as concerned the nature of a protectorate put limits on the freedom of action by either the British government or the chartered company. The lawyers advised that jurisdiction could not be acquired over the subjects of any civilized power so long as the territories were under Her Majesty's protection and not part of Her dominions; and this limitation applied no matter whether it was the government or the chartered company that exercised the jurisdiction. The lawyers were being consistent in following the British approach towards the extent of responsibility in a protectorate as laid down in the Berlin Conference. The govern-

47. Goldie to Pauncefote, June 18, 1885, Aberdare to Salisbury, July 1, 1885, F.O. 84/1879.

48. Webster, Gorst, Deane to Salisbury, August 8, 1885, F.O. 84/1879.

ment was brought face to face with the problem that if full jurisdiction was felt necessary in the interests of peace and good order in the Niger districts and of fulfilling international obligations British sovereignty would have to be established. The law officers claimed that this had been done by the German Empire in its territories to the west of Zanzibar. In fact, the lawyers were wrong on this point.

Germany, through the grant of a charter in February 1885 to the Society for German Colonization, had established a protectorate in the German sense.<sup>49</sup> And, by its very nature, this protectorate carried more jurisdiction than a British protectorate did. But the law officers did not stop to consider such a difference. The Germans for their part were also complicating the situation because they were partly confused in the matter of protection, at least insofar as the grant of a charter was concerned. They believed that they were following the example of earlier British chartered companies. Bismarck wanted to avoid unnecessary cost to the state in colonial endeavors and it seemed to him that the grant of responsibility to a chartered company was an ideal solution to this problem. But the form of German charter granted in East Africa had little resemblance to its British counterpart. The German emperor took suzerainty over certain named territories "outside of the suzerainty of other Powers" and in return he offered protection. The latter was, in fact, quite an unreal offer since neither the German government nor the company had any means of exercising effective authority there. The German company was given under the terms of the charter all rights acquired by various treaties with the local chiefs; this amounted to the granting of full sovereign rights and the ownership of land.<sup>50</sup> This power was, at least in theory, wide-reaching because it meant that the company was responsible for justice over German subjects, natives, and Europeans. This

49. W. O. Henderson, *Studies in German Colonial History* (London: Frank Cass & Co. Ltd., 1962), pp. 12-14; Mary E. Townsend, *Origins of Modern German Colonialism 1871-1885* (New York: Columbia University Press, 1921), pp. 180-81.

50. Charter of Protection, February 27, 1885, in Hertslet, *The Map of Africa by Treaty*, II, 681.

amounted to the exercise of full jurisdictional rights in the area and in this respect the charter settled for the German situation an open problem which was disturbing relations between British company officials and administrators. There were other respects, not relevant here, in which the German charter differed from the English model it was supposedly following. One might also notice as a practical point that it was not very long before the German government found that its hope of almost nil responsibility on the part of the state had to be abandoned because of company inability. It was a prime example of a "paper colonial claim"—one lacking administrative substance—and this was occurring just at the time when the Berlin Conference was closing its session on the formalities of a protectorate.

The Germans failed to understand or deliberately misconstrued the British example. Almost the same might be said of the British lawyers considering the Niger although in the latter it was probably more accurate to describe the lawyers as being ignorant of what the German protectorate situation really amounted to. Their confusion and lack of understanding was well demonstrated when twelve days after they had issued their report an addendum was forwarded to the Foreign Office.<sup>51</sup> This was to the effect that on practical grounds it was not "desirable" under the existing circumstances to grant a charter with such wide powers as the company was urging. The circumstances that recommended such a cautious practice were the failure of the crown to assume sovereignty in the Niger district. Again, the problem of sovereignty and the limited concept of protectorate arose to present difficulties in the devising of a policy for the area.

It is not the purpose of this work to follow through the twisted negotiations that took place between the company and the government. They finally resulted in a victory for Goldie's scheme of a chartered company with wide powers of government and administration.<sup>52</sup> But initially Pauncefote seemed to be winning

51. Addendum, Webster, Gorst, Deane to Salisbury, August 20, 1885, F.O. 84/1879; Flint, *Goldie*, pp. 76-77.

52. Flint, *Goldie*, p. 81.



with his more narrow approach of a limited, foreign-jurisdiction area and the British government in prime control.<sup>53</sup> The company was to act as an agent of the British government in matters of jurisdiction and some of its officials were to be authorized to exercise enumerated powers as set out by Order in Council under the Foreign Jurisdiction Acts. This was not satisfactory to the wishes of the company and Aberdare brought pressure to bear on the lord chancellor and the prime minister in the hope of convincing the Foreign Office that the wishes of the company should be served.<sup>54</sup> Finally Goldie was able to benefit from a revision of policy arranged through the offices of R. S. Wright who was called in by the Foreign Office to consider the draft of the charter before it was finally approved in the Council Office. The result was the grant of a "vague and indefinite charter."<sup>55</sup> It made no provision as to sovereignty residing in the British crown and it kept at a minimum the state's authority in the region. The ultimate victory of the company in the grant of a favorable charter can be traced in the pages of Flint's book on Sir George Goldie.

One of the side issues in the grant of the charter and a matter of central importance in a study of the nature of British foreign jurisdiction was the attitude of officials—both governmental and company—towards foreigners in the Niger region. This matter came up for legal consideration in September 1885 when the Foreign Office was still trying to sort out a scheme of government for the area.<sup>56</sup> So as to get round the legal difficulty of exercising jurisdiction over foreigners without the assertion of British sovereignty the Foreign Office advanced a new argument based upon the General Act of the Berlin Conference. This read to the effect that in Article 30 Great Britain undertook to protect foreign merchants in the Niger areas which were under British sovereignty or protection to the same extent as if they were British subjects. Since the treaties between the queen and the

53. See Salisbury to Webster, Gorst, Deane, September 7, 1885, F.O. 84/1879.

54. Aberdare to Halsbury, October 10, 1885, Halsbury MSS; Aberdare to Salisbury, November 4, 1885, F.O. 84/1879.

55. Wright to Salisbury, December 26, 1885, F.O. 84/1879.

56. Salisbury to Webster, Gorst, Deane, September 7, 1885, F.O. 84/1879.



Niger chiefs and between the company and the chiefs were vague in scope but on the whole granted a wide jurisdiction, usually over all persons within the area, the Foreign Office now argued that this settled the question of sovereignty. There was no practical need to obtain sovereignty since sufficient jurisdiction was already granted and the Berlin Act conferred a legal reason justifying the exercise of such power.

The law officers, however, refused to accept this new evidence.<sup>57</sup> They considered that the treaties and the Berlin Act were not sufficient in themselves to enable the crown to exercise jurisdiction over the subjects of the states represented at the conference or any other state that agreed to adhere to the act. They repeated that if the intention was to obtain jurisdiction over foreigners it could be fulfilled only by acquiring the consent of the states concerned. One might notice that historians commenting on the charter, like J. E. Flint and J. C. Anene,<sup>58</sup> have argued that the company took jurisdiction over foreigners, including indigenous inhabitants. This may have been so in practice but it certainly was not confirmed legally. Article 16 of the charter dealt with the foreign jurisdiction problem in terms confirmatory of the existing situation. The company was enjoined "to conform to and observe and carry out" all the directions of the Foreign Office relating to jurisdiction exercisable by the British government under the Foreign Jurisdiction Acts or the Berlin Act. The company was also instructed to appoint legal officers and provide courts for the administration of justice. The costs involved in such matters were to be borne by the company. The charter did not endorse or create a wide foreign jurisdiction for the company; it merely confirmed the existing situation, following the usual system that arose under the Foreign Jurisdiction Acts and the Berlin Act. The former legislation did not allow jurisdiction over foreigners and the law officers held that the Berlin Act did not alter this rule, at least so far as the subjects of foreign, civilized states were concerned. At the same time, since

57. (Copy) Webster, Corst, Deane to Salisbury, September 30, 1885, F.O. 84/2275.

58. Flint, *Goldie*, pp. 81, 86; Anene, *Southern Nigeria*, p. 69.

so many of the treaties with the chiefs did confer such wide jurisdiction the company doubtless felt justified in exercising wide, even as far as sovereign, rights; and this extended certainly to indigenes, and perhaps to foreigners. But, so far as legal theory went, there was no change in respect of the application of foreign jurisdiction to the subjects of civilized states.

While the negotiations on the grant of a charter and the exercise of jurisdiction were being finalized between the company and the British government the latter was proceeding with the settlement of the exercise of its foreign jurisdiction powers in West Africa. The Order in Council that issued in 1885 might on first appearance seem to indicate that the hardening of legal rules was being modified and a more liberal approach adopted. Its issue was made necessary because of the failure of the 1872 order. As West Africa opened up and British and foreign subjects moved far inland beyond the reach of existing controls and authority, increased irregularities took place—slavery offences, murders, raids.<sup>59</sup> For five years, between 1880 and 1885, arrangements were slowly thrashed out between the interested parties—the Foreign Office, the Colonial Office, Treasury officials, and the parliamentary draftsman.<sup>60</sup> Reilly began the drafting of the order but during the protracted negotiations died and Wright finished it.

The order that issued did not materially extend the principles of foreign jurisdiction that had applied in the earlier order,<sup>61</sup> but details were improved. The territorial limits of the order were significantly widened, its arrangement was streamlined, and the extent of jurisdiction was made explicit.<sup>62</sup> It applied obviously to British subjects and to persons properly enjoying Her Majesty's protection. It should be noted that this phrase was used in a

59. For example, note the complaints made by the British consul in 1879 about trouble between traders and natives in Sierra Leone and along the rivers of West Africa, Easton to Salisbury, October 18 and November 3, 1879, F.O. 84/1541; and minute, Owen, May 9, 1881, F.O. 84/1697.

60. See minutes on draft Order in Council, Reilly, March 11, 1881, November 27, 1882, F.O. 84/1659; memorandum, Wright, August 11, 1884, F.O. 84/1698.

61. Anene, *Southern Nigeria*, p. 72.

62. West African Order in Council, March 26, 1885. Certain powers of deportation were provided and the regulation-making power was further defined.

limited sense, not meaning all the natives in a protectorate, but those persons who were either in fact or nominally attached to an embassy, legation, or consulate. The order also applied to "all persons, whether natives of Africa or not and whether subjects of any non-African power or not, who submit themselves to the jurisdiction . . ."; furthermore, it applied to "natives of Africa, being subjects of any native King or chief, who, by Treaty or otherwise, consents to their being subject to the jurisdiction."<sup>63</sup> These provisions relating to Africans did not extend existing theory; they merely made definite the range of jurisdiction, still based (as it always had been) upon the principle of consent of foreigners, including natives. This consent might be given either by submission to jurisdiction or through treaty. Some commentators, like Claire Palley in her book on constitutional developments in Southern Rhodesia, have taken the view that the 1885 order supplied a wider jurisdiction over persons than the 1872 order.<sup>64</sup> This is not borne out in fact; the earlier document referred to British subjects, protected persons, and those who consented—the usual basis of jurisdiction. But it did not itemize these groups in the manner of the later order. One should note, however, that a wider—although exceptional—jurisdiction was provided in the Bechuanaland Order in Council of 1885, a document which was largely unused.

This order of 1885 relating to West Africa did not mark a liberalization of attitude. The same was true of the 1889 African Order.<sup>65</sup> The governing principle was still jurisdiction over foreigners by consent; there was no extension of the types of persons subject to the order. Basically the new order replaced the 1885 order, widening its operations geographically—to the whole of Africa including the island of Madagascar but excluding Zanzibar. In this way the troublesome vacuum that existed be-

63. Pauncefote to Wright, March 18, 1885, F.O. 84/1747. The law officers, James, Herscell, Deane approved the order, March 25, 1885, F.O. 84/1747. The definition of "protected person" was extended in the 1893 African Order in Council.

64. Claire Palley, *The Constitutional History and Law of Southern Rhodesia, 1888-1965, with Special Reference to Imperial Control*, p. 57.

65. Africa Order in Council, October 15, 1889.

cause the Nyassa districts were not covered by any of the existing orders was filled.<sup>66</sup> But no lack of jurisdiction over foreigners was acknowledged.

This gradual hardening of legal opinion as to the extent of British responsibility in a protectorate or foreign jurisdiction area began in the mid-1880s to pose practical problems for administrators in London and in the actual protected area. As early as 1886 one can find complaints made by the Colonial Office and the Foreign Office about the inconvenient and unsatisfactory effects of the legal doctrine on protectorates. They turned hopefully to the example of German protectorate jurisdiction.

During 1884 and 1885 Germany had been planting its flag and spreading its influence across the Pacific—New Guinea, New Britain, New Ireland, the Caroline islands, the Marshall islands, and elsewhere. Pauncefote disapproved of German behavior in respect of these places because on his reckoning the Germans had only established sufficient authority to justify protection rather than the full assumption of jurisdiction and power.<sup>67</sup> “The Germans cannot pretend to exercise civil and criminal jurisdiction over the vast groups in which they have planted the German flag in token of protectorate but not of sovereignty.” In expressing such disapproval Pauncefote was arguing, not surprisingly, from within the framework of British legal theory which linked the limited establishment of authority with the existence of protection and not of sovereignty. He was opposing the concept of “paper sovereignty.” Consequently a case could be made that in these German areas the jurisdiction of the British high commissioner stationed in Fiji should continue to operate at least in respect of British citizens; the areas might still be regarded as not coming within the jurisdiction of any civilized power. Certainly it was very much an open question as to the extent of German jurisdiction in such cases and the kind of relationship that existed between British subjects and German rule there. Pauncefote hoped for an immediate resolution of these doubts.

Under the Criminal Code of the German Empire promulgated

66. Salisbury to Treasury, March 2, 1886, F.O. 84/2271.

67. Minute, Pauncefote, January 13, 1886, F.O. 64/1151.



in 1871 the territorial principle was applied to all offences committed within the imperial boundaries. Section 3 of the code provided as follows: "The criminal laws of the German Empire are applicable to all criminal acts committed in German territory, even if the author is a foreigner."<sup>68</sup> The following section made the usual provision that generally a prosecution would not lie in respect of crimes committed in a foreign country. But a special note was appended bringing the districts of German consular courts within the scope of section 3: "Note—The districts of German consular court are German territory within the meaning of this section." Consequently in German theory the territorial principle extended to consular districts and protectorates. Count Hatzfeldt, the German ambassador to London, informed the British Foreign Office that a protectorate was not limited to "the persons residing or sojourning in a protected territory" but extended to the districts.<sup>69</sup> A protectorate took on a territorial aspect although the Germans did not definitely spell this out as meaning sovereignty. In a diplomatic note of May 1886 the German government made it quite clear that it exercised a wide and exclusive power in a protectorate. All persons within the protectorate irrespective of nationality were subject to German jurisdiction; furthermore no other state could exercise a concurrent jurisdiction with Germany in the protectorate. So, for example, British foreign jurisdiction could not run alongside the German legal system. Another law of the German government, passed in April 1886, assured a discretion to German authorities as to the regulation of jurisdiction in German protectorates.<sup>70</sup> The government stated that its intention, pursuant to the authority conferred by this law, was to establish promptly in its Pacific protectorates the necessary organization for the exercise of a regular jurisdiction. All persons, irrespective of nationality, who were residing in the protectorates would come under German jurisdiction and no other state would be allowed to exercise

68. Criminal Code in Geoffrey Drage trans., *The Criminal Code of the German Empire* (London: Chapman and Hall, 1885), pp. 89–90, 180–81.

69. *Note verbale*, Hatzfeldt, August 29, 1886, F.O. 64/1152.

70. *Note verbale*, Hatzfeldt, May 11, 1886, F.O. 64/1152.



any amount of jurisdiction side by side with it. Consequently the high commissioner's power did not run in these German areas.

The basis of this wide jurisdiction was the fact that the Germans considered that protected territories, by their very nature, were placed under German control or "suzerainty." This word was not defined but it amounted to less than sovereignty. In British law it was a problem word as evidenced by the confusion caused in the Transvaal case of 1881-84. Under the terms of the Pretoria Convention of 1881 signed by British representatives and Transvaal burghers it was stated in the "preamble" that "complete self-government, subject to the suzerainty of Her Majesty . . . will be accorded to the inhabitants of the Transvaal territories." No clear definition of "suzerainty" was made although it was explained in correspondence with the governor of the Cape colony that Britain took superiority over the Transvaal which possessed independent rights of government subject to certain restrictions.<sup>71</sup> When the matter came up for reconsideration in the 1884 London Convention all mention of the word "suzerainty" was dropped at the insistence of the Transvaal delegates. But ten years later, and again in 1898, and the following year, British officials resurrected the concept with queries as to whether it still applied to relations between Transvaal and Great Britain under the terms of the 1881 Pretoria Convention.<sup>72</sup> In German legal theory the essential aspect of suzerainty was that it accompanied the creation of a protectorate. The existence and the exercise of German jurisdiction did not depend upon a grant or the authority of the native chief; nor did it wait upon an obvious act of sovereignty like the declaration of the protected territories as being part of the empire. The German law officers had settled this statement of theory with the assistance of Dr. Kraüel, a former German consul in New South Wales, who had been specially commissioned by the German government to deal with questions affecting islands in the South Pacific.<sup>73</sup>

71. Hertslet, *Treaties*, XV, 401; for subsequent explanation of the problem of suzerainty in the Transvaal case see Chamberlain to Milner, December 15, 1898, C.O. 417/252/24624.

72. Ripon to Rigby, Reid, June 28, 1894, C.O. 417/132/10857; Webster, Finlay to Chamberlain, November 1, 1898, C.O. 417/252/24624.

73. Malet to Rosebery, March 13, 1886, F.O. 64/1151.

The British Foreign Office received the advice of the German doctrine without either approval or criticism. The Colonial Office, however, seized upon this advice as an opportunity for a serious reexamination of the whole theory of jurisdiction over foreigners. The lawyers had been developing a line of theory which in the case of New Guinea and Bechuanaland had gone directly against the line of thinking receiving official favor in Germany. Bramston urged that the German position should be used to establish the principle of reciprocity so that courts in British protectorates could have authority over foreigners in the same manner as the German case. Lord Kimberley, the colonial secretary, agreed and condemned British theory as inconvenient and contrary to the interests of law and order.<sup>74</sup> He thought that the German insistence on the exercise of jurisdiction would be advantageous to Britain as "a strong argument in favour of our exercising similar jurisdiction within our protectorates." Thinking in the Colonial Office had moved noticeably in the direction of endorsing the German approach of treating a protectorate as an annexation, at least for the purposes of administering justice and enforcing decrees. Mercer, one of the secretaries, told Bramston that the British course "must inevitably be influenced by the German example." Wingfield, another secretary, hoped that Britain would follow the German lead.<sup>75</sup> It seemed obvious to them as administrators that the German approach was consonant with common sense and expediency.

Another example of protectorate jurisdiction that came up for consideration by the British Foreign Office was the French situation. France had established protectorates in Cambodia, Annam, and Tunis.<sup>76</sup> The first case arose in a treaty of 1863 which was confirmed four years later and added to in 1884. Annam was placed under French protection by the treaty of Saigon in 1874.

74. Minutes, Bramston, June 3, 1886, Kimberley, June 13, 1886, C.O. 225/23/9232.

75. Wingfield, see Appendix; minutes, Mercer, August 5, 1886, Wingfield, August 6, 1886, C.O. 225/23/13870.

76. For background see Stephen H. Roberts, *History of French Colonial Policy (1870-1925)* (London: King & Son, 1929), p. 425; John F. Cady, *The Roots of French Imperialism in Eastern Asia* (Ithaca, N.Y.: Cornell University Press, 1967), pp. 275-76, 287; R. Piédelièvre, *Précis de Droit international public ou Droit des gens* (Paris: Pichon, 1894), pp. 87-91.

It was a rather vague document on the point of jurisdiction; it did not specify a protectorate relationship but in the course of subsequent events the French government took it to mean that implicitly a protectorate had been established. The protectorate was clearly recognized by treaties in 1883 and 1884. The Tunis example was created by a treaty of "guarantee" or protection signed in 1881. In that case almost the entire sovereignty was placed in the hands of the French government. So that British officials might more clearly understand the French approach to protectorates Hertslet was requested to supply a memorandum on French law and practice. He resorted to two reports, one in 1883 referring to Tunis and the other in 1882 to Cambodia and Annam. The upshot of these reports was that the French cases were not fully comparable with either the German or the English types although they were closer to the former than to the latter.<sup>77</sup> In the case of Tunis a question had arisen in 1883 as to the continuation of British foreign jurisdiction in the recently established French protectorate. Was French jurisdiction to be exclusive? This point was settled simply in a practical manner by a British agreement to abolish its consular jurisdiction there. But such a voluntary agreement did not settle the issue of legal principle. When France assumed an exclusive jurisdiction in Annam and Cambodia the British protested, arguing that their extraterritorial rights were not extinguished by the establishment of French protection. The protest went unheeded. So, again, from a legal viewpoint, the problem was not solved although in practice the argument for a wide and exclusive jurisdiction held sway.

While these German and French examples were under review in the Foreign Office Pauncefoot began to have doubts about his earlier stand and that of the law officers.<sup>78</sup> The German law of April 1886 referred to protectorates as "state protected German territory." Pauncefoot was not sure what this phrase amounted to; it seemed to make the territory German soil and part of the German Empire. Furthermore, he began to query the principle

77. Minute, Hertslet, October 12, 1886, F.O. 64/1152.

78. Minute, Pauncefoot, July 28, 1886, F.O. 64/1152.

upon which the law officers had been operating. He wondered why a native chief who had unfettered sovereign, territorial power could not delegate jurisdiction over all persons—natives or foreigners. He allowed that the law officers' view was correct in those cases where a foreign power apart from the protecting power had also acquired from the native chief the right of jurisdiction over its subjects; then the chief was not in a position to delegate all jurisdiction to the protecting power. The only reason he could offer for the reluctance of the law officers to affirm a full delegation where the chief's sovereignty was unfettered was the possibility that the principles of territorial sovereignty as applied in international law between civilized countries did not apply, either in theory or in practice, to uncivilized countries. Yet that argument looked hollow in principle since it was accepted that in the African cases upon which the law officers had made their pronouncements there did exist a political society and form of government under the chiefs that were capable of making treaties.

The German approach of subjecting protectorates to the control of the Reichstag had a convenience in practice that appealed to administrators in Whitehall. So it was decided that another reference should be made to the law officers on whether the British Parliament had a similar power to legislate for countries under British protection.<sup>79</sup> William E. Davidson, who had been appointed as legal adviser to the Foreign Office in the middle of the year, prepared the reference. He had had some previous experience with this kind of problem when he was assisting the law officers, Webster and Gorst, in the Bechuanaland case of July and August 1885.<sup>80</sup> Gorst supported the line that jurisdiction over foreigners could not be obtained from native chiefs. He held this view primarily on the grounds that although such jurisdiction might be transferred in the case of a grant by a European or wholly civilized state this rule did not apply in the case of a

79. Minute, Bramston, September 23, 1886, C.O. 225/23/16726.

80. Webster, see Appendix; minutes, Davidson, October 18, November 24, 1886, including Stellaland notes for draft report for consideration of law officers, Davidson, July 23, 1885, note for attorney-general on proposed draft opinion by solicitor-general, Davidson, August 1, 1885, F.O. 64/1152.



semicivilized or barbarous state. Davidson, on this point, opposed Gorst and asserted that if the sovereignty of a native chief was sufficiently absolute and established he could transfer full jurisdiction to Britain over all persons—his own subjects, British subjects, or the subjects of other foreign states. But he also allowed that practical objections on diplomatic grounds might exist. Now, in the new reference comparing the German and British situation, Davidson stuck by his former opinion and, surprisingly, he was firmly supported by Pauncefote. The latter seems to have taken a complete change of views and now sought to liken the protectorates of Britain to those of Germany. And, even more surprisingly, he claimed that his views on this point had always tended to this approach.

My own opinion always has been and still is the same as that of German government. A "protectorate" is a vague term which internationally gives all the powers which the parties agreed upon or (where there is no native ruler capable of making a treaty) which the protecting power chooses to assume—provided they are not inconsistent with prior rights of other governments.<sup>81</sup>

But Pauncefote still had some doubts because the British case was complicated by a question of municipal law, as to whether British legislation enabled the crown to exercise powers amounting to an absolute protectorate.

The reference to the law officers was of major proportions since it involved a general review of the whole nature of protectorates. Sir Edward Clarke, the solicitor-general, later wrote in his memoirs that the case on which he and the attorney-general spent most time was this German case where the British government considered the assumption of jurisdiction over persons of all nationalities residing in the protectorate.<sup>82</sup> The Foreign Office, in its desire to facilitate the work of the lawyers and hoping for a favorable decision, supplied quantities of background information on the protectorate situation. Six opinions had been given by the law officers in the period 1880–86; Hertlet had prepared various reports. In addition the lawyers were

81. Minute, Pauncefote, November 25, 1886, F.O. 64/1152.

82. Clarke, see Appendix; Edward G. Clarke, *The Story of my Life*, p. 260.



referred to various jurists who had written on the topic—Calvo's *Le Droit international* which had a section on protectorates was sent along to give a European viewpoint. But it was six months before the law officers made a reply. The delay arose partly because of the broadness of the question and partly because existing knowledge was both scanty and uncertain. The Colonial Office at one point became quite anxious about the failure of the lawyers to report and asked to have the matter expedited but with no success.<sup>83</sup> At this time arrangements for Zululand were being settled and the Colonial Office wanted the advice of the lawyers' report to help to determine the policy it should follow for the area. Since the Zulu war of 1879 British influence had been exercised in an informal and ill-defined manner through a British resident. The arrangements approached that of protectorate administration, at least in its vagueness. In 1886 the Colonial Office was considering further the arrangements for the area and was tossing up between protection or annexation. The law officers' report could be useful in this regard by providing a final answer to the question of jurisdiction over foreigners. But the delay of the lawyers in coming to any decision was accompanied by the decision of the Colonial Office to follow its own course and proceed with annexation. This occurred in June 1887.

The law officers' report appeared the same month and was intended as a complete memorandum on the basic principles involved in protectorate administration.<sup>84</sup> It reviewed and explained the previous legal decisions and sought to provide guidelines for the future. A copy was printed for cabinet. The lawyers began with the statement that these protectorates were "somewhat new to international relations" and had not been treated by earlier writers of international law. But they thought the problem could be resolved by looking to existing municipal law which had well settled principles that could be applied. The starting point was the rule that the right of jurisdiction over persons found in any territory belonged only to the power which was

83. Minute, Herbert, February 18, 1887, C.O. 225/23/21435; minute, Hervey, March 11, 1887, F.O. 64/1208.

84. Webster, Clarke to Salisbury, June 29, 1887, F.O. 64/1208.

entitled to the rights of territorial sovereignty. Those rights could be acquired by conquest, cession, or settlement. This principle was fundamental. Furthermore, it was agreed that the municipal laws of one country could not enlarge its right of jurisdiction to include the subjects of another where the former did not have territorial sovereignty. The Foreign Jurisdiction Acts did not purport to do that, nor did or could any other law. In looking at the German situation the lawyers noted that the German government established what it called "consular protectorates." This did not involve claiming the rights or accepting the liabilities of territorial sovereignty; yet the Germans claimed that their officers and tribunals exercised jurisdiction over all subjects therein. The law officers denied the Germans this claim.

In their review of earlier law officer decisions the current incumbents thought they could find a common thread of agreement. They drew upon four of the reports—concerning the Cape in 1880, New Guinea in 1884, and Bechuanaland in 1885 and 1886—and assimilated them to one principle, denying jurisdiction over foreigners unless the consent of the foreign power had been obtained. In one sense it was a major achievement for the law officers to be able to reconcile such a range of opinions so that in the future there would be a definite statement to take as a starting point. But in another sense the finding of such harmony of views was a disservice since in doing so the lawyers had overlooked, glossed over, or avoided a number of points of difference between the various law officers. For example, Gorst had made a rather blanket rejection of the assumption of jurisdiction; James and Herschell had not been so forthright and had conceded the possibility of such an assumption, at least in theory. And all of them ignored the point that a different rule might apply where a native chief did not have the capacity to transfer any amount of jurisdiction.

This opinion seemed to formalize the doctrine of capitulations for protectorates—that each European power should feel obliged to obtain capitulations from a protected state because failure to do so meant that there would be no adequate means whereby a subject of the European power could obtain appropriate and

adequate justice. Salisbury snorted at this prospect which would impose a more complicated and uniform procedure on the existing vague system of creating protectorates. "I thought we had had enough of capitulations." "This doctrine practically sets up 'capitulations' in all protected territories of this class."<sup>85</sup> He was quite opposed to the report and condemned government under capitulations as the worst government in the world. Pauncefote was equally upset with the stand of the lawyers.<sup>86</sup> He thought that probably they misunderstood or misconstrued the facts. Their confusion was most likely to arise in the German use of the words "protectorate" and "suzerainty" upon which the Germans based their claim of exclusive jurisdiction. Pauncefote, drawing upon the text of Calvo, brought further confusion to the topic by introducing the concept, *mi-souveraineté*. The *mi-souverain* yielded to the suzerain control over all the exterior relations of the former; and so the argument followed straight on that the suzerain took control over all the concerns of foreigners therein. If the German government was suzerain rather than protector these special and exclusive rights could be defended.

The Colonial Office received the report of the law officers with no more favor than the Foreign Office. Mercer thought the report could be ignored or rejected.<sup>87</sup> The core of the problem was one of terminology and this point the lawyers had not taken sufficiently into account. "The Law Officers have no doubt considered this matter carefully; but it is after all a somewhat academical question of little practical moment inasmuch as it turns on the meaning of a name to which England assigns one significance and Germany another." Mercer was right in highlighting the semantic problem but he underestimated the significance of the "academical question"; it could not be disposed of so easily. Mercer agreed that the lawyers had correctly explained the English law on the subject. But he thought they failed to understand the German situation; and, in any case, as a practical matter there was nothing Britain could do about it. In fact, the Germans

85. Minute, Salisbury, *ca.* July 4, September 5, 1887, F.O. 64/1208.

86. Minute, Pauncefote, September 8, 1887, F.O. 64/1208.

87. Mercer, see Appendix; minute, Mercer, July 28, 1887, C.O. 225/27/14514.

had annexed their "sphere of influence" but they chose to call it a protectorate. This situation was further strengthened by the demarcation agreement signed between Britain and Germany in November 1886 delimiting their respective spheres of influence in East Africa. This agreement barred each country from interfering with the sphere of the other. Consequently it could be argued that each country was competent to establish whatever form of government it thought fit in the area of its influence. And so Germany could govern its area as though it were annexed territory and this situation was not altered by the area being described as a protectorate. Bramston also found the report unhelpful but took comfort in the fact that from a practical viewpoint it had little immediate effect for the Colonial Office.<sup>88</sup> The Zululand question had just been settled by annexation and it had also been decided to annex New Guinea. Only the Bechuanaland situation remained in a mess and Bramston and Holland, the colonial secretary, still hoped that it might be possible to do a deal with the Germans to the effect that Britain would give them jurisdiction over British subjects in their protectorates in return for similar jurisdiction over Germans in British protectorates. In short the Colonial Office accepted the German understanding on protectorates and was anxious to find some way of bringing British practice, if not also theory, into harmony with it.

During August 1887 the papers on this problem were circulated in cabinet but before any decision was reached fresh information arrived from Germany about the legal status of German protectorates.<sup>89</sup> The gist of the new evidence was that a protectorate was in essence equivalent to sovereignty, and the difference between the two concepts was quantitative only. This information placed a slightly different emphasis on the question of German protectorates from that adopted in the reference to the law officers just recently decided; now the nature of sovereignty rather than protection was made implicit in the question.

88. Minute, Bramston, July 29, 1887, Holland, August 4, 1887, C.O. 225/27/14514.

89. Minutes, Pauncefote, August 14, 1887, Cockerell, August 17, 1887, F.O. 64/1208; articles in *Norddeutsche Allgemeine Zeitung* on German Colonial State Law, in memorandum, Scott, September 13, 1887, F.O. 64/1208.



So early in 1888 the law officers were called upon again to ascertain whether they might change their mind in the light of the new information. The Foreign Office thought that by pushing the arguments of suzerainty and *mi-souveraineté* the lawyers might settle for almost-sovereign rights in a protectorate, at least to the extent of approving exclusive jurisdiction.<sup>90</sup> To add strength to this case the Foreign Office drew the lawyers' attention to more eminent European jurists who had written on these points and on international law generally. The classic text by Vattel, *The Law of Nations or the Principles of Natural Law* . . . , written in 1758, was referred to, as was the work by Johann Moser, *Contributions to the Most Recent European Law of Nations in Times of Peace, and in Times of War*, written in 1778–81. The latter was given credit for inventing the term *mi-souveraineté*.<sup>91</sup> Davidson noted: “. . . he is entitled also to the distinction of being sent to the law officers so that he may own to his offspring which Heffter calumniates as being of a nature bâtarde.” Contemporary European writers were also produced—the outstanding German authority, Bluntschli, whose *Modern Law of Nations Presented as a Lawbook* (1868) was a highly acceptable text throughout Europe, and A. W. Heffter's *The European Law of the Present* (1844). With this reference the Foreign Office wanted to ensure that there existed no confusion or lack of information on European interpretations on this aspect of international law. But still the lawyers remained constant: “We see no ground in the matters now brought to our notice for modifying or adding to our opinion. . . .”<sup>92</sup> And they confirmed that the Germans should be advised of the excessiveness of their claims.

A stalemate was reached—to the disadvantage of the Foreign Office and the Colonial Office. Both departments wanted a change in the law in the direction of assimilating the British position to that of Germany. But the lawyers in the course of pro-

90. Salisbury to Holland, December 22, 1887, C.O. 225/27/25680; Salisbury to Webster, Clarke, March 18, 1888, F.O. 64/1208.

91. Minute, Davidson, ca. March 19, 1888, F.O. 64/1208; J. H. W. Verzijl, *International Law in Historical Perspective* (Leyden: Sizthoff, 1968), I, 260.

92. Webster, Clarke to Salisbury, April 20, 1888, F.O. 64/1208.



gressive references had become more certain of the legal position. They saw it as a matter to be determined by the settled municipal law that Britain could not assume the jurisdiction desired by the departments for reasons of administrative convenience. Nor, as they saw the law, could Germany assume such jurisdiction. But whether she did or did not was a matter beyond the reach of the British law officers; they could only condemn and disapprove of the German stand. In their own realm these law officers now stood firm and neither the urgings nor the criticisms of the Foreign Office or the Colonial Office could make them change their minds—or the law.

Legalism was developing to an all-time high. This was further borne out in another problem in 1888 when the Foreign Office was again frustrated by the law. The department was seeking to arrange better extradition terms with Germany. Late in 1887 Baron von Plessen, the German *chargé d'affaires* in London, complained of the difficulty that German authorities in the Togo protectorate were experiencing because British authorities repeatedly declined the extradition of criminals who had fled from the German protectorate into adjoining English territory.<sup>93</sup> This refusal arose from the fact that the extradition treaty of 1872 between Germany and Britain related only to their respective "territory" including colonies and possessions, making no reference to protectorates. Nevertheless, it was obvious that administrative problems, especially the maintenance of law and order, were bound to arise if protectorates became known as places of refuge from the arm of the law with no possibility of extradition. The Germans asked that the British government consider extending the extradition treaty to the German protectorates.

Legal problems immediately presented themselves in the way of Britain adopting this German suggestion. Probably fresh legislation would be necessary to extend British extradition treaties to protectorates;<sup>94</sup> and, also, fresh agreements with the protected states would be needed since by British theory the protectorate

93. (Copy) verbal communication, Plessen, November 8, 1887, F.O. 64/1404.

94. Minute, Pauncefote, January 21, 1888, Salisbury to Webster, Clarke, January 30, 1888, F.O. 64/1404.

preserved its autonomy to the extent that it was not affected by treaty. Pauncefote realized that it was "different with the Germans who assert[ed] complete dominion and suzerainty in their protectorates." A statement of these views was prepared and sent to the law officers for their comment.

Meanwhile, the German government, aware of these British legal complications, took a further initiative and suggested that instead of a reciprocal agreement including both British and German protectorates it might only extend the extradition treaty to Germany and German protectorates; the British side of the agreement would extend just to the empire—the United Kingdom, the British colonies, and British foreign possessions.<sup>95</sup> This one-sided arrangement was also forwarded to the law officers.<sup>96</sup> The Foreign Office pointed out the existence of two precedents for taking a more comprehensive view of extradition cases, to accommodate legal and political considerations. In the Ashburton treaty of 1842 between Britain and the United States provision was made for the extradition of persons who being charged with the commission of certain offences within the jurisdiction of the one contracting party were found within the territory of the other. This equation of "jurisdiction" with "territory" was a modification on the usual form of treaty (such as the German one of 1872) between "territory" and "territory." The other example which ran counter to the usual form was the treaty with the Netherlands of 1874 where again extradition was allowed where the offence was committed within the jurisdiction of the one state and the offender was found in the territory of the other. The law officers, in separate reports on the two references, vetoed both proposals—the alteration of the existing treaty with Germany along the lines of the Netherlands treaty, and the provision by legislation or agreement for the mutual surrender of fugitive criminals in British and German protectorates.<sup>97</sup> The reason for this was the standard argument, lack of sovereignty. Neither approach could be taken "without admitting that the

95. Memorandum, Ratibor, February 7, 1888, F.O. 64/1404.

96. Salisbury to Webster, Clarke, February 22, 1888, F.O. 64/1404.

97. Webster, Clarke to Salisbury, March 3, 1888, F.O. 64/1404.

protectorate conferred the rights and duties of territorial sovereignty" and this would be "in conflict with the principles hitherto maintained by Her Majesty's Government." Webster and Clarke were the law officers at the time but this report was probably the work of Sir Edward Clarke, the solicitor-general. He had been concerned with extradition cases since 1864 and had published a book on the topic in 1867.<sup>98</sup> By way of consolation the lawyers' report tried to make helpful, practical suggestions about the course of action that British administrators could take to offer facilities to German officers but the Foreign Office found their points unworkable. In matters such as extradition the problem of sovereignty in a protectorate had become almost insuperable.

This triumph of British legal theory on the nature of sovereignty was further reflected in the preparation of forms for the "Proclamation of Annexation" and the "Proclamation of Protectorate."<sup>99</sup> Hertslet prepared these in 1889. The intention was twofold—to bring a greater uniformity to the previous diverse practices, and to ensure that annexation was not equated with protection. The latter approach ran directly with the stream of hardened legal theory.

But, although this limited, legal view on the nature of foreign jurisdiction seemed to be riding high, regardless of foreign forms, the policy-planners had not given up completely on the possibility of effecting some change in the law. No sooner had the lawyers laid at rest the question of comparing British and German practice than the problem of jurisdiction over foreigners raised itself in a new form. This was the occasion of the debate on the revision of the Foreign Jurisdiction Acts. By 1888 the Foreign Office thought it was time both to amend and to consolidate the various acts. Henry Jenkyns, the parliamentary draftsman, was called in to prepare drafts of the amendment and consolidation bills. And, in doing so, he was able to bring in his

98. Edward G. Clarke, *A Treatise upon the Law of Extradition . . . and the Cases Decided Thereon* (London: Stevens and Haynes, 1867); the book went into four editions (1903).

99. (Copy) memorandum on forms of proclamation to be used when establishing protectorates and annexing territory, Hertslet, June 12, 1889, C.O. 225/33/13010.

own approach and so add further legal interpretations to the discussion.

Jenkyns had quite definite ideas on the topic and was anxious to devise an escape from the impasse. This he thought he could arrange through the legislation he was drafting. So he drafted a declaratory clause to remove doubts as to the extent of the jurisdiction legally exercisable by Her Majesty in protectorates.<sup>100</sup> His intention was to make it quite clear that so far as English municipal law was concerned the courts established by Britain in protected states could exercise jurisdiction not only over British subjects but also over the subjects of other European states. He was influenced by practical considerations; the basic principle to apply was that the amount of jurisdiction to be exercised over foreigners should be determined as a matter of policy by the circumstances of each case, and not as a matter of law. For example, he thought that in an area like the Somali coast of Africa where British influence was beginning to penetrate following agreements with local chiefs in 1887 and an exchange of diplomatic notes between Britain and France early in 1888, the question of the amount of British jurisdiction should be settled not by consideration of legal principles but on practical grounds; it was "expedient" that Britain set up courts with jurisdiction over all and exclude the establishment of consular courts by other European powers. It was certainly essential in the native states of India that the British government have the right to object to the establishment of courts by other powers. This view was shared by Jenkyns's drafting assistant, Courtenay Ilbert,<sup>101</sup> a former legal member of the Council in India. The latter was obviously the authority on the Indian situation and he sought to assimilate the African protectorates to those in India.<sup>102</sup>

Pauncefote agreed that the Foreign Office could go along with this direct approach taken by Jenkyns so long as it was "declaratory and 'to remove doubts' and not framed as if imparting any

100. Memorandum on Foreign Jurisdiction (Amendment) Bill, Jenkyns and Ilbert, June 18, 1888, F.O. 97/562.

101. See Appendix.

102. See memorandum on Indian and African protectorates, Ilbert, January 24, 1889, F.O. 97/562.



new power.”<sup>103</sup> His hesitancy reflected his awareness that legal opposition would soon arise to any untoward extension of the jurisdiction legislation. But, meanwhile, Jenkyns of his own initiative and without instructions from the Foreign Office decided to carry the English law on protectorates one step further.<sup>104</sup> To justify this move he argued from the premise that international law on the subject of uncivilized states whose foreign relations were under the exclusive control of a European power, such as the British protectorates in Africa and India, was still so unclear that it had yet to be made. In India the practice had been worked out but it had not yet been embodied in theory or law. The time had arrived for the British government as a matter of policy to decide what the law should be.

Jenkyns adopted the German view of the divisibility of sovereignty, in which the protecting country possessed some sovereign rights and the protected state the balance. In this he was supported by Sir Henry Maine, the Whewell Professor of International Law at Cambridge University, in his new textbook, *International Law*.<sup>105</sup> But this approach was a revision of the hallowed principle of the indivisibility of sovereignty such as had been enunciated by the eminent English jurist, John Austin. The latter, in his *Lectures on Jurisprudence* delivered at the University of London between 1828 and 1832, provided basic principles on sovereignty which English lawyers had followed almost as gospel in the mid-nineteenth century. Austin condemned the view of those writers on positive international law who referred to “half or imperfectly sovereign states.”<sup>106</sup> He argued that this obscured the essence of sovereignty and independent political society because it seemed “to import that the governments marked with it are sovereign and subject at once.” This was a condition—being sovereign and subject at once, “a political mongrel”—that Austin denied could exist. “I believe

103. Memorandum on Bill, Pauncefote, June 29, 1888, F.O. 97/562.

104. Memorandum on Foreign Jurisdiction (Amendment) Bill, Jenkyns and Ilbert, November 15, 1888, F.O. 97/562.

105. Ilbert to Pauncefote, November 10, 1888, F.O. 97/562; Henry J. S. Maine, *International Law* (London: John Murray, 1888), p. 58.

106. John Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law* (5th ed., London: John Murray, 1911), I, 252–56.



that no government is sovereign and subject at once: that no government can be styled with propriety *half* or *imperfectly supreme*." And he thought the epithet "half sovereign" capricious. Every government which had been described "imperfectly supreme" fitted into one of three categories—either it was perfectly subject to the other government, or it was perfectly independent, or it was a constituent member of a government supreme and independent, i.e., it was jointly sovereign with the other government.

This Austinian view of sovereignty had such standing in the world of jurisprudence that it was only days before legal argument was taken up against Jenkyns's new approach. Robert S. Wright, junior counsel to the Treasury, attacked the innovation for ignoring the principle of the indivisibility of sovereignty. There ensued a keen debate, by memorandum, on the point. Wright had become involved in the question of jurisdiction in protectorates in August 1885 when he prepared a long memorandum for the use of the law officers on sovereignty and protection, with particular reference to current Bechuanaland problems.<sup>107</sup> In that document he outlined his overall approach which centered on two elementary principles—that jurisdiction was a part of sovereignty and that sovereignty was territorial. The nature of jurisdiction that was held in a territory varied with the circumstances but there were four basic kinds: British subjects in a territory which was vacant or was occupied only by barbarians not recognized as owners or sovereigns; territories conquered by or ceded to the crown; foreign or extra-territorial jurisdiction; and delegation of jurisdiction. There was nothing new or unusual in Wright's classification of jurisdiction. He placed protected states in the third category. The rights of jurisdiction so acquired he characterized as being "essentially a personal privilege" and so a British tribunal established in such an area could not take jurisdiction over foreigners except by consent. Wright looked at the various acts relating to West African jurisdiction and claimed that all were expressly limited to British

107. See Davidson minute, December 19, 1887, enclosing Wright's memorandum of August, 1885, F.O. 97/562.

subjects. One should note that on this point Wright was in error, at least to the extent that one of the acts (34 and 35 Vict. C.8), extended to natives although not to Europeans.

In November 1888 Wright followed on from his earlier statements.<sup>108</sup> He strongly denied that British legislation was the proper machinery to achieve the objects Jenkyns desired. The Foreign Jurisdiction Acts were not, and never had been, a means of extending British jurisdiction. Furthermore, the question, being one carrying international implications, could not be settled by British municipal legislation; a British statute was not competent to clear up the doubts of other nations. So the assertion of a mere protectorate was not an effective way of taking jurisdiction over foreigners; the proper means was by diplomatic arrangement or "an assertion of partial sovereignty" as an act of state. Wright did not explain the meaning of the latter phrase but following an Austinian approach it should have meant the actual assertion of sovereignty. The important point that Wright was trying to establish was that if diplomatic consent could not be obtained the only other means of taking full jurisdiction was through the assertion of sovereign and not protectorate rights. Protection was too weak and limited in concept. Wright acknowledged that recent international usage seemed to approve the idea that in a protectorate over barbarous or semicivilized regions the argument could be advanced that partial sovereignty had been asserted; but he pointed out that this view was contrary to the opinion of the law officers and furthermore that it was not a universal incident of protectorates. Each protectorate should be treated separately and even where an assertion of partial sovereignty was made each foreign power should be consulted to obtain its consent to such an assertion. In all, Wright felt that this trend towards partial sovereignty was "a novel usurpation which could not be insisted on without danger."

Jenkyns answered these charges and pleaded that the matter should be considered not as one of pure law but as one of policy

<sup>108</sup> Notes as to clause for British protectorates, Wright (Note A), November 15, 1888; (Note B), November 20, 1888, F.O. 97/562.

to be made by the cabinet with reference to foreign policy and British interests.<sup>109</sup> He argued for a free hand allowing the development of international law in the case of these "new" protectorates over uncivilized states. The law officers themselves had admitted that this kind of protectorate was new to international law; and under those circumstances Jenkyns thought it better that the law should be made by the queen's government and Parliament rather than by Her judges. In making new law attention should be paid to general principles plus matters of expediency with the object of leading the development of the international law on that topic in a suitable and convenient direction. "The real point is in what direction is it desirable as a matter of policy to make international law on this subject." At the existing stage of its development international law on this topic had been applied only to civilized states; it was now necessary for it to develop and be modified in the case of uncivilized states.<sup>110</sup> The semisovereign states of India were showing the way; there it had been shown that where the protector had acquired the duty of protecting the subjects of foreign powers from injury and supplying them with justice it was equally necessary for him to have a right to prevent those foreigners from injuring others and to punish them if necessary. Jenkyns also drew upon the Berlin Act of 1885 for support although the argument was not convincingly made. He reasoned that one could presume from the fact of notification of a protectorate as required under the act that the rights of other European powers were excluded or limited. But he was ignoring a report already made by the law officers to the effect that the act did not and could not create an exclusive jurisdiction.

The important difference between the approach of Jenkyns and Wright lay in their respective notions of sovereignty. Wright preferred the notion of indivisibility; Jenkyns, encouraged by the recent testimonial of Maine, objected to this on the ground

109. Remarks on Note A, Jenkyns, November 16, 1888, remarks on Note B, November 22, 1888, F.O. 97/562.

110. Note of application of principles of international law to foreign subjects in British protectorates, Jenkyns, November 23, 1888; also note, Ilbert, May 16, 1888, F.O. 97/562.

that it ignored the distinction between external and internal sovereignty. "The powers of sovereigns are a bundle of powers and may be separated one from another." In asserting that sovereignty was divisible he pointed to the Foreign Jurisdiction Acts and the Orders in Council made under them as indicating that sovereignty was not necessarily territorial. Jenkyns argued that the whole object in creating a protectorate was through a legal device to give effect to the theory whereby the protecting state automatically acquired full external sovereignty.

So a protected state is a territory for the purpose of giving effect to the external sovereignty acquired by the protector. So jurisdiction will depend on the existence of the assumption of the protectorate, and not whether some naked chief is sufficiently civilized to cede jurisdiction. It seems absurd that the question of the jurisdiction of one of the Queen's courts should depend upon such points.

Both Jenkyns and Ilbert pleaded on practical grounds that the British position, especially in India, would become difficult if the law did not adapt; likewise similar administrative problems would arise in Africa. They tried to highlight this point that failure to look to the German lead would be detrimental to British interests.

To circumvent the growing problem of jurisdiction Jenkyns and Ilbert urged, as the course creating least difficulty, that Britain enter into a reciprocal agreement with Germany for the exercise of jurisdiction. They also prompted the Foreign Office to approach the other European nations on the basis that an agreement on jurisdiction had been reached by mutual consent at the Berlin Conference. Anderson, who had been one of the British delegates there, remembered that the European nations did not recognize the British view of the broad distinction between sovereignty and protection.<sup>111</sup> He was ready to argue that through subscription to the act those nations had consented and none would object to the exercise of jurisdiction over their subjects in a British protectorate. But Hertslet had doubts about this approach. Jenkyns and Ilbert also tried to steer the problem

111. Anderson to Hertslet, November 26, 1888, F.O. 97/562.



clear of further legal enmeshment by emphasizing that Salisbury and possibly the cabinet should intervene to decide the issue on policy grounds.<sup>112</sup> An indication of government policy, based upon practical considerations, the Indian situation, and the Berlin Act, should first be obtained as "a guide to the Law Officers." Jenkyns was reminded of the words of Sir Richard Bethell when he was attorney-general: "This is an admirably drawn case, with one great defect, it does not contain any indication of the direction in which an opinion is desired." Jenkyns was convinced this certainly was a case where the law officers should be led.

Pauncefote explained the problem to Salisbury, but perhaps with little zeal because the former tended to side with Wright, that the extension of jurisdiction could not be achieved by British legislation. In view of his doubts on the whole question he was able to persuade Salisbury that the legal question should be referred higher, to the ultimate authority, the lord chancellor, for a decision between the views of Jenkyns and Wright.<sup>113</sup> The question to be decided was how far Parliament could go in legislating to declare jurisdiction over foreigners in British protectorates, and how far was it a matter of international law as yet unsettled.

Nothing was heard from the lord chancellor, Halsbury, for over twelve months; then, late in 1889, he asked for new copies of the correspondence.<sup>114</sup> Three weeks later, his secretary, Muir Mackenzie, minuted to his chief:<sup>115</sup>

I have no doubt the opinions of the Law Officers, on the question of the existing law, are right—but my impression is they would show our relations with our dependencies in India to be illegal; and in Africa itself would prevent our doing what Germany has done and intends to do. Even your Bynkerschoech (if that is the way to spell him) can hardly have foreknown the facts of our government in India, or foreseen the possibilities of Africa.

112. Jenkyns to Pauncefote, November 27, 1888, F.O. 97/562.

113. Pauncefote to Salisbury, December 8, 1888; Salisbury to Halsbury, December 15, 1888, F.O. 97/562.

114. Muir MacKenzie to Pauncefote, December 5, 1889, F.O. 97/562.

115. Muir MacKenzie, see Appendix; Muir MacKenzie to Halsbury, December 26, 1889, Halsbury MSS. Bynkerschock was an eminent eighteenth century Dutch jurist.



Muir Mackenzie feared that this was a case where English law was wrong.

Finally, in March 1890, the lord chancellor replied, rather briefly, rejecting Jenkyns's ideas and his proposed change of the law.<sup>116</sup> Halsbury considered the law to be quite settled, in the sense that the whole concept of protectorate and consequent rights rested upon convention. This meant that the obligations imposed upon the protecting power would vary according to policy and convenience. He was arguing for a flexibility and elasticity of principles and warned against the danger of restriction that would arise if these obligations were defined in international law. One can appreciate the logic of this approach, to avoid the stultification of legalism. But Halsbury was ignoring the real facts of the case before him, that already the conventions had hardened considerably, already somewhat inflexible rules had evolved and needed modifying. The Foreign Office and the Colonial Office were already confronted by definite legal rules, not embodied in statute or other documentation but enshrined almost like a legal decision.

Halsbury's opinion was based upon the notion that a protectorate had a real meaning and function separate from the concept of sovereignty.

Protectorate furnishes a convenient middle state between annexation and mere alliance so long as it is allowed to remain mere convention, but if you assert a principle which practically annihilates any distinction between the rights and obligations of a protecting power and those of complete sovereignty, then the function of protectorate is at an end.

The lord chancellor asserted that the law admitted no doubt on this point; Jenkyns's approach was unacceptable because it gave a direction to the law which it had not previously taken.

Obviously this opinion was taken as decisive and so the con-

<sup>116</sup> Memorandum, Halsbury, March 28, 1890, F.O. 97/562. The lord chancellor seems to have mislaid the papers twice, see minute, Davidson, *ca.* March 28, 1890. Note, also that the lord chancellor claimed to base his report solely on Jenkyns's draft bill without seeing other papers. Yet his opinion seems to indicate that he was aware of the dispute between Jenkyns and Wright and the views of the latter.

solidation of the Foreign Jurisdiction Bill was proceeded with, failing to incorporate Jenkyns's proposals for the extension first of British municipal law and then of international law.<sup>117</sup> Jenkyns and Ilbert had been opposed by a battery of legal opinion—the lord chancellor, successive law officers, Wright. In an ambiguous mood, Pauncefoot also doubted that the lack of jurisdiction could be overcome by unilateral British action. To these opponents it was a legal matter and not one of policy for the cabinet. Furthermore they saw it as a matter of municipal law which was quite settled and any deficiencies that might exist in international law were irrelevant. None of them shared the desire of Jenkyns to develop the international law on this new problem. One should treat with reserve those commentaries which treat the Foreign Jurisdiction Act of 1890 as a basic charter for the administration of protectorates.<sup>118</sup> In conception it was built very much upon its antecedents; its main value was its consolidation and rationalization of the earlier pieces of legislation. Its significance has been overdramatized; although it is true that a number of significant Orders in Council were issued under the act during the 1890s and after the turn of the century for the regulation of foreign jurisdiction in protectorates the act itself did not create or allow any new developments in protectorate administration. It certainly did not endorse that the queen had jurisdiction within a protectorate over all natives and all foreigners. Anene has misconstrued British legal developments in the latter part of the 1880s. He puts forward the proposition that the legal powers of the British crown in protectorates were being brought up to date. He argues that the apparently prevailing view was that the queen had jurisdiction in a protectorate over all natives and foreigners. He claims that "the niceties of the legal distinction between annexations and protectorates were whittled down to a point where any distinction ceased to have any practical meaning." In fact, Anene reads developments of the 1890s back into the previous decade and confuses administrative desires and

117. 53 & 54 Vict., c.37.

118. Note, for example, that Anene, *Southern Nigeria*, p. 112, gives the act considerable significance.

practical necessity with the legal and theoretical position. The Foreign Office wanted to wipe the distinction at this stage but was still being held up by theory. It was not until the mid-1890s that the distinctions were whittled away, both in practice and theory.

By 1890 the legal position seemed fixed through the advice of the lord chancellors, Selborne and Halsbury, and of some of the law officers, especially Webster, Gorst and Clarke. Jurisdiction could not be readily assumed over natives; and, similarly, legal obstacles had become fixed in the way of assuming jurisdiction over foreigners. In other words, British authority in protectorates was being restricted in accordance with the principles of foreign jurisdiction as applied in countries like Turkey and China. No allowance was made for differences in civilization and levels of organization. In fact the concept "protectorate" was just another term fitting into the regular concept of foreign or extraterritorial jurisdiction. The legal principles had been shaped and settled around considerations of minimum responsibility and interference by Britain—the government wanted to avoid expenditure and involvement, whether military, administrative, judicial, or legislative. Of course British interests would be protected as efficiently as possible but those interests were to be strictly British; the interests of foreigners or natives might prove too costly. So, in one sense, the wider motivation of the necessity of ensuring conditions of peace and order was relegated to a minor position—unless British interests became predominant as happened in the case of New Guinea and Bechuanaland. In those cases, annexation and not protection was the appropriate answer; sovereignty was the touchstone.

In a series of incidents since 1885 the situation became increasingly clear that the senior British lawyers, the lord chancellors and the law officers, were closing ranks on the meaning of and responsibilities associated with a protectorate. Although neither point was fully or definitely spelt out the leading legal authorities generally agreed on the common ground of limited jurisdiction. There were a few legal critics and opponents—primarily the legally-trained advisers in the Colonial Office and the

Foreign Office, such as Bramston, Mercer, Pauncefote, and Davidson, along with the two external advisers, Jenkyns and Ilbert—but their views were not endorsed. In any case, except with respect to the latter two, their views were not yet very definitely settled or clearly expressed. By contrast, Lord Selborne in the Berlin Conference discussion was adamant on the distinction between sovereignty and protection. And in consequent problems of jurisdiction in protectorates the lack of sovereign rights on the part of British interests always proved the debilitating factor in the establishment of a legally effective administration. The Orders in Council of 1885 and 1889 had application only over limited groups of people. In theory the same situation pertained in the Niger basin. The Foreign Jurisdiction Act of 1890, an ideal opportunity for a significant new statement of theory, ended up as a document limited in jurisdictional scope because of the strict sense of the legalists. And while British legal thought was taking its narrow bent European jurists had settled upon a convenient and expansive view of the nature of a protectorate and the duties associated with it. A few British lawyers were aware of these continental advances and tried to effect a change at home but the established view persisted that Britain should not commit itself too heavily in the affairs of these areas. This view suffered from the fact that situations would arise where for reasons of administrative efficiency it would be both desirable and necessary to have a wider range of legal powers than those afforded under the existing narrow framework of foreign jurisdiction.





*The 1890s: A Solution*



## Bechuanaland Breaks Down the Barrier

The reversal of legal theory on the authority of the crown over its protectorates began in February 1891 through the initiative of Bramston of the Colonial Office in preparing a lengthy memorandum designed specifically to change the minds of the official legal advisers of the government. In this he was largely successful and thereby set in motion a gradual process of revision which over the next decade chipped away at the inflexibility of approach that the senior lawyers—the lord chancellors and the law officers—had been building up between 1879 and 1891. The result was the emergence of a greater administrative freedom for the British government.

The 1891 memorandum arose out of jurisdictional problems in Bechuanaland and beyond during 1890. Three systems of administration were operating in the area at that stage:

1. The British protectorate, north of the colony and south of the 22nd parallel of south latitude (and not within the jurisdiction of any civilized power);
2. The British "sphere of influence" in the area north of the protectorate and south of the Zambesi. This "sphere" was an undefined unit as to power and extent. And by an agreement signed in February 1888 it extended eastwards into the lands of the Matabele. This was known as the "Moffat Treaty" signed with Lobengula, the paramount chief of that tribe. He agreed on a policy of peace with Britain and that he would not enter into any correspondence or treaty with any foreign state.
3. The operations of the British South Africa Company under concessions from some of the native chiefs within the British sphere.<sup>1</sup>

1. Loch to Knutsford, May 20, 1890, C.O. 417/42/10939. For background on the development of the three divisions, see Knutsford to Salisbury, July 3, 1890, C.O. 417/42/10939.

There were two police forces functioning in the area, one maintained by the imperial government and one by the company. Although power had been given under the 1885 Order in Council for the high commissioner to create courts within a part of this area no courts had been established.

The high commissioner, backed up by his legal adviser, complained that he was hamstrung by a lack of authority in and beyond the protectorate.<sup>2</sup> For example, he lacked jurisdiction over offences committed beyond the protected territory by members of the Bechuanaland Police Force; furthermore, within the protectorate he had no jurisdiction over the members of the police force of the company. The position was also being complicated by the influx of Europeans into the country. As a result the high commissioner called for the establishment of a strong executive authority and he thought this could best be done by annexing the protectorate to the adjoining colony of Bechuanaland.

For political and financial reasons the Colonial Office refused to contemplate annexation.<sup>3</sup> Fairfield thought Loch was pushing the answer of annexation too hard. Instead, the Colonial Office settled upon the issue of an Order in Council based upon the 1885 Bechuanaland Order and extending its territorial boundaries—to include not only the lands of Gasitsive of the Bangwaketse tribe and Sechele of the Bakwena but also all the lands of Khama of the Bamangwato, of Moremi of the Batawana, and of various minor chiefs.<sup>4</sup> This would take British jurisdiction as far north as the Zambesi river. Nearly all the treaty arrangements with these chiefs provided that Her Majesty was given authority to rule white men. This was the same basis upon which the 1885 order had been settled. So, in this manner, a vague authority was given to Britain over foreigners. Fairfield pointed out that, just as in 1885, the Colonial Office could request the high commissioner “to instruct his magistrates or other officers to be chary of

2. Loch to Knutsford, May 20, 1890, C.O. 417/42/10939, June 17, 1890, C.O. 417/43/13242.

3. Minutes, Fairfield, July 9, 1890, Knutsford, July 14, 1890, C.O. 417/43/13242.

4. Minutes, Fairfield, June 10, 1890, Bramston, June 11, 1890, Knutsford, June 13, 1890, C.O. 417/42/10939.

dealing with any foreigners" who might come into contact with British courts. Note, therefore, that jurisdiction over foreigners was allowed as a possibility but the basis upon which this occurred was no different from that in the 1885 order. In fact the new order which issued in June 1890 was important mainly as an extension of the earlier order pushing the high commissioner's jurisdiction northward to the Zambesi.<sup>5</sup> This order was no more precise or definite than its predecessor. Bramston summed up the position aptly: ". . . by being a little vague we shall no doubt get all we want at present." Knutsford ordered that the order be made "as general in terms as possible"; not even the treaties or concessions should be specified. Consequently the high commissioner was entrusted with the power to exercise by proclamation such authority and jurisdiction as Her Majesty already possessed within the territorial limits set down in the order.<sup>6</sup> This procedure of government by proclamation had already been adopted in respect of the legislative bodies in the Gold Coast and Lagos for the adjoining protectorates. But the high commissioner was instructed to "be sparing in the use of this Order."

Loch had his doubts about the extent of this jurisdiction; although the wording of the grants was wide he feared that legal obstacles might be raised unless the land was actually made British. But the Colonial Office wanted to avoid formally raising the question of sovereignty with either the law officers or the Foreign Office. As Herbert commented, if the Colonial Office sent a very detailed reference to the law officers it would be "merely an invitation which they could hardly refuse, to raise objections."<sup>7</sup> Indeed, the Order in Council was issued seven days before the papers were sent to the law officers for their report and their attention was not drawn to the problem of jurisdiction. Herbert thought this point should be ignored:

. . . think the notion that the consent of minor chiefs is necessary as an antecedent to the establishment of a British protectorate over their territories has become out of date through the political development of the last two or three years.

5. Order in Council, June 30, 1890.

6. Instructions in Knutsford to Loch, July 17, 1890, C.O. 417/49/13483.

7. Minute, Herbert, July 7, 1890, C.O. 417/43/13242.



Since the 1884-85 Conference the European nations that were parties to the partition of Africa into protectorates were claiming jurisdiction over foreigners; the logical corollary was that those nations gave up in the protectorate of another protecting power jurisdiction over their own nationals. The Colonial Office was thus beginning to adopt a hard line on its right to exercise jurisdiction in a protectorate. Herbert was ready to push for a more complete degree of British responsibility. "We do not mean to have Boers Germans Portuguese or any other foreign filibusters, protectors or rulers (say) in Khama's country; whether Khama agrees with us or not, he must acquiesce." The law officers replied to the Colonial Office reference in one sentence, that they saw no objection to the terms of the Order in Council.<sup>8</sup>

This report, however, could not be taken as signifying a drastic change in legal theory since it made no attempt to pronounce any conclusions on the question of jurisdiction. It was merely a rubber stamp report, issued after the fact. So, although Colonial Office theory had moved in favor of the assumption of a wide jurisdiction in a protectorate, a formal shift in legal theory had yet to be established. This came about as a result of the proliferation of practical problems of administration facing the high commissioner in Bechuanaland towards the end of 1890. Conditions in Africa were changing rapidly, calling for decisive moves by London. Loch wrote urgent pleas that Britain exert sovereignty in the areas where European occupation was taking place;<sup>9</sup> a failure to control Europeans in the protectorate might be taken by friendly chiefs as a sign of weakness with the result that they might be encouraged to take the law into their own hands. But it was not only in the areas of Bechuanaland as far north as the Zambesi that Loch saw a need for more effective action by British authorities. During 1890 he was becoming concerned about the growing influx of Europeans into the areas to the east of the Bamangwato and to the north and west of the

8. Knutsford to Webster, Clarke, July 11, 1890, C.O. 885/13; Webster, Clarke to Knutsford, July 11, 1890, C.O. 417/49/13483.

9. Loch to Knutsford, November 26, 1890, C.O. 417/47/24216; Loch to Knutsford, December 9, 1890, C.O. 417/48/25225.

South African Republic.<sup>10</sup> These were the lands of the Mashona tribes and of the Matabele. The British South Africa Company which had received a royal charter in October 1889 had begun its penetration of the area with the journey of the Pioneer Column in 1890 to Fort Salisbury in Mashona territory. The company had already obtained from the natives economic and mineral concessions (notably the Rudd concession) with the right to exclude others from poaching on their economic ventures but no agreement had been reached with native leaders as to land rights and jurisdiction. The charter provided the company with the authority to acquire extensive powers by treaty but this had not yet been followed up. Consequently Loch as high commissioner was apprehensive about the possibility of trouble, fighting, and even slaughter between the European intruders and the natives, especially the fierce and powerful Matabele. In November there were estimated to be four hundred whites in Mashonaland under no jurisdiction and there were indications that large numbers of fortune-seekers would soon be moving there in quest of the reputed, fabulous sources of gold.<sup>11</sup> The next month Loch reported that about six hundred wagons were continually passing up and down the road to Mashonaland. Besides there were many prospectors on pack-animals and poorer men on foot. Cape officials pointed to the great danger of the whole area drifting into a state of anarchy and the solution they offered to this problem was the annexation of the protectorate and of the sphere of influence as far north as the Zambesi.<sup>12</sup>

Loch was strongly supported in this suggested course of action by the British South Africa Company working its concessions in part of the area under British influence. The company was only too conscious of its failure to complete the acquisition of jurisdiction from the native chiefs, and in particular from Lobengula.

10. For background on British penetration into present-day Rhodesia see L. H. Gann, *A History of Southern Rhodesia* (London: Chatto & Windus, 1965), pp. 74-107; Hugh M. Hole, *The Making of Rhodesia*, chaps. vi-x; Philip Mason, *The Birth of a Dilemma; the Conquest and Settlement of Rhodesia* (London: Oxford University Press, 1958), pp. 120-45.

11. Loch to Knutsford, November 20, 1890, C.O. 417/47/24191.

12. Loch to Knutsford, February 6, 1891, C.O. 417/72/2871.

Also doubts had arisen in the Colonial Office as to the power of the company under its charter to set up courts and exercise civil and criminal jurisdiction in them.<sup>13</sup> The charter entrusted to the company the duty of preserving peace and order and the power to establish a police force but there was uncertainty as to whether this enabled the company to establish courts. The possibility of acquiring sufficient jurisdiction by obtaining treaties with the relevant chiefs seemed dubious and was met by the practical objection that such a move might now arouse the hostility of the natives, especially the Matabele. At the same time the Colonial Office was not willing to take the positive step of annexing so large and possibly useless an area. Fairfield condemned especially the company for bringing the trouble on itself. It was puffing up the gold prospects to swell its number of supporters; but Fairfield thought it unlikely that Mashonaland would prove to be an El Dorado. He feared that the company through economic failure would wind itself up and Britain would be left "rather embarrassed with a desert-colony on our hands, stretching to the Zambesi."<sup>14</sup> He also argued on the practical ground that there was no precedent for the annexation of such a large block of country which was almost wholly destitute of revenue resources and therefore would have to be so very dependent on "the caprice of the House of Commons."

Other avenues of action were investigated in the hope of finding an easy solution short of annexation. Some brief consideration was given to a reversion to the older charter precedents of Stuart times offering the grantees powers of government over the natives and all settlers. Harris, a clerk in the Colonial Office, had for private literary reasons made himself an expert on this field and he was asked to work up a case.<sup>15</sup> This he did but his propositions were ignored because in the meantime a significant rethinking of the whole situation was taking place among the

13. Minutes, Fairfield, December 29, 1890, January 9, 1891, Herbert, December 30, 1890, Knutsford, December 30, 1890, C.O. 417/47/24191.

14. Minutes, Fairfield, January 9, 1891, C.O. 417/48/25225, February 10, 1891, C.O. 417/72/2871.

15. Minutes, Fairfield, February 11, 1891, Herbert, February 12, 1891, Knutsford, February 12, 1891, Harris, February 25, 1891, C.O. 417/47/24191.

senior Colonial Office planners. The most satisfactory solution seemed to be to follow the European lead. Fairfield pointed to the German claims of exclusive jurisdiction in their protectorate of Damaraland.<sup>16</sup> He acknowledged that in most parts of Africa where Britain exercised authority under Order in Council jurisdiction extended only to British subjects. But he also drew attention to the exceptional case of the adjacent protected territories of the Gold Coast where since an Order in Council of 1874 a wide legislative and executive power had been validated in respect of powers already acquired in fact.<sup>17</sup> This had been further confirmed by the Order in Council of 1887. He also instanced the Zulu Reserve when it was a protectorate but this was not a good example since legal and jurisdictional relationships there had not been clearly regularized before annexation.

Fairfield's intention was to press for a full-scale revision of British legal theory: "in fact all over Africa, by common understanding among the civilized powers, the protecting European power controls all Europeans on the spot." Knutsford, the colonial secretary, and Herbert gave their full support:<sup>18</sup> "our strongest foundation will be the view of protectorates, as carrying some sovereignty, adopted by European consent since Berlin." Fairfield also took the three cessions in Bechuanaland in 1885 and the 1890 Order in Council as strengthening his hand; he urged that greater effect should be given to the wording of the cessions that they offered jurisdiction over all white men.

The solution to this lack of jurisdiction in British protectorates had become channelled into two different but interrelated approaches—the need to assert some kind of sovereignty by grant or otherwise from native chiefs, and the need to obtain the consent of European powers to the exercise of jurisdiction over their nationals. Since 1885 the Foreign Office had been suggesting that the latter problem could be circumvented by the proposition that the European powers through their signature of the Berlin Act had given their consent. But this proposition had been rejected

16. Minute, Fairfield, January 9, 1891, C.O. 417/48/25225.

17. Referred to within.

18. Minutes, Herbert, Knutsford, February 12, 1891, C.O. 417/47/24191.



by the law officers. Now, in 1891, with Knutsford determined to make a full reference to the law officers Bramston turned his attention to this earlier proposition of the Foreign Office. Bramston had been absent during the initial discussion of the Mashonaland case but he quickly familiarized himself with the background and the position that Fairfield was pushing. By mid-February he had prepared a very detailed memorandum which soon became accepted as the basis of future argument and theory on the development of the concept of protectorate.<sup>19</sup>

As a starting point Bramston relied upon the view of Knutsford that protection might amount to "a limited quasi-sovereignty which would justify our hanging a Frenchman for murdering a German (or vice versa) in a protectorate."<sup>20</sup> He emphasized that he was dealing with a new kind of a problem; earlier writers on international law had not tried to explain the kind of protectorate where a civilized power took under its protection uncivilized people and land—where, since the native rulers were incapable of maintaining peace among Europeans, the protecting power had to maintain courts, police, and other institutions for the control, safety, and benefit of its subjects, and sometimes of the natives. Bramston's views coincided with those of Jenkyns in his advice to the Foreign Office on the Foreign Jurisdiction Bill of 1888. Also Bramston was probably influenced by the new approach being taken by William Hall, one of England's leading international lawyers. In the third edition of his text, *International Law*, published in 1890, Hall had stated an interpretation of protectorates similar to the European view.<sup>21</sup> Earlier editions took the traditional line on the exclusiveness of territorial sovereignty. But in 1890 he added a section on protectorates over uncivilized or semicivilized peoples. He argued that the protecting state had to have rights over foreign subjects and to be in a position to protect foreigners, its own subjects, and protected

19. Memorandum as to the jurisdiction and administrative power of a European state holding protectorates in Africa, Bramston, February 20, 1891, C.O. 417/69/4373. The memorandum was possibly ready by February 12, 1891.

20. Minute, Bramston, February 11, 1891, C.O. 417/72/2871.

21. Minute, Bramston, August 8, 1895, C.O. 417/156/13310; William E. Hall, *A Treatise on International Law* (3rd ed., Oxford: Clarendon Press, 1890), pp. 127-29.



natives from harm and wrong-doing. The protecting state had to be able to offer some amount of security and justice as between Europeans and as between Europeans and natives. For his evidence he relied upon the German example where he saw the protectorates as areas directly administered by the crown.

As to the necessity of consent Bramston argued that the obligations imposed upon a protecting power by the General Act of Berlin, 1885, were such as to involve an implied, if not an actual, consent to the establishment of courts exercising jurisdiction over the nationals of each of the signatory states, and to the exercise of administrative authority over them. Already in all the German protectorates in Africa jurisdiction was asserted over foreigners without protest from any power except Britain. And in the British case he argued

all the civilized powers whom it is necessary to consider have expressly given their consent as regards Protectorates on the Niger; have so acted at the Berlin Conference that their consent in other cases may be presumed; and as no protest has been made in respect of the exercise of this jurisdiction in German Protectorates, their tacit consent may also be inferred [in respect of British protectorates].<sup>22</sup>

In addition Bramston drew upon another international agreement to buttress his argument that the consent of foreign powers had been already given. This was the General Act of the Brussels Conference relative to the African slave trade, signed in July 1890. The opening articles imposed upon a protecting power a range of important duties and obligations in respect of conditions in its protected territory. To counteract the slave trade the protecting country was expected to provide administrative, judicial, religious, and military services, to establish fortified stations, build roads and other communications, provide cruisers, stamp out barbarous customs, liberate slaves, legislate against grave crimes on the person. If such duties were to be fulfilled the protecting power needed definite and substantial administrative, legislative, and judicial powers.

22. Bramston memorandum on protectorates, February 20, 1891, C.O. 417/69/4373.

[The act] is a declaration that the civilized powers recognise, as a principle of international law, that the protection of an uncivilized territory carries many of the most important attributes of a sovereign state, and that the subjects of civilized powers are, within such territory to have the benefit of, and be subject to all administrative and judicial institutions established by the protecting power to the same extent as the subjects of that power.

Bramston also sought to justify his claims on practical grounds. Since, by its very nature, a protectorate meant that the protecting power was the sole representative of the protected state in foreign relations, the protector was obliged to protect the subjects of foreign powers from injury in the protectorate and to supply them with justice. Such a duty could not be properly fulfilled if the protector did not have a reciprocal right to prevent foreign subjects from injuring others and to punish them if they were wrong-doers.

Thus the Colonial Office, turning against the concept of the indivisibility of sovereignty, now claimed the right to assert partial sovereignty when a protectorate was established. The earlier notion of very limited responsibility consequent upon a lack of sovereignty was being undermined. Bramston also suggested the machinery that might be used for the creation and exercise of such partial sovereignty; cessions of jurisdiction such as those made in 1885 by the three Bechuana chiefs should be made (two gave jurisdiction over all white men while the third gave a qualified "white" jurisdiction); and an Order in Council should be prepared along the lines of the 1890 one for Bechuanaland. So this order which was slipped by the law officers without raising the question of jurisdiction was put up as the model to adopt.

The Colonial Office deliberately intended to alter the direction that legal theory had taken in the 1880s. As Fairfield put it: "the older opinions of the Law Officers about protectorates can now be considered to have no application to 'African Protectorates', the nature of which is now defined by 'Conventional Public Law'."<sup>23</sup> Not surprisingly, Jenkyns, the parliamentary counsel, sent a note of encouragement to Bramston:<sup>24</sup>

23. Minute, Fairfield, February 13, 1891, C.O. 417/69/4373.

24. Jenkyns to Bramston, February 23, 1891, C.O. 417/69/4373.

We are very glad to see that you are taking the same line as we did from a more concrete point of view than we were able to do. It does seem absurd that we should be the only country standing out on the question when it is dead against our own interests in the African protectorate you refer to and elsewhere. I hope you will be able to succeed.

Foreign Office approval was also obtained.<sup>25</sup> Anderson thought Bramston's case was "very ably put" and he could see benefits accruing for the Foreign Office. "If he can get Law Officers to agree it will be of great use to us in Zanzibar and elsewhere." One should note, however, that the Foreign Office did not give much consideration to Bramston's memorandum and the significant implications that arose from it. This lack of attention arose partly from the fact that the Colonial Office in its reference to the other department glossed over the point that a change in direction of policy was being effected and instead relied mainly on the practical point that rapid developments in the area made the extension of authority highly necessary.

The next step was to obtain legal approval to the principle formulated in Bramston's memorandum. Herbert was not wholly sanguine of the outcome.<sup>26</sup> So he hoped "to anticipate and avert the objections" which the lawyers were likely to raise on the point of foreign consent. He offered a diplomatic answer; the British government should act upon the assumption that the consent of the foreign powers had been granted; in the event of any foreign power disputing jurisdiction the British accepted that it would have to either remove such objection or take the responsibility of disregarding it. But the point was that the government acted upon the assumption of the existence of consent. Herbert anxiously urged that the lawyers be induced to change their stand. "It is very desirable that we should not elicit an opinion based on narrow or technical grounds which would interfere with what is altogether an act of policy."

The law officers were asked to approve the views expressed

25. Salisbury to Knutsford, March 5, 1891, C.O. 417/70/4768; minute, Anderson, *ca.* March 2, 1891, F.O. 84/2157.

26. Minute, Herbert, March 7, 1891, C.O. 417/70/4768.

in Bramston's memorandum and a draft Order in Council drawn up to give effect to the memorandum in the area south of the Zambesi. The Colonial Office was hoping for an early reply and fortunately just after three weeks had elapsed with the law officers considering the reference a crisis occurred in Africa calling for an immediate legal answer. Loch telegraphed that some Boer trekkers were planning to proclaim a republic in a large part of the sphere of British influence—in Banyai country extending from Limpopo to the Zambesi and including Mashonaland.<sup>27</sup> The Transvaal Boers were desperate to obtain some of this land where the British South Africa Company was penetrating; the Boers traditionally regarded this hinterland as theirs. To forestall them it seemed necessary to proclaim a protectorate immediately and to give the high commissioner power to deal with them under the proposed Order in Council. The law officers were asked to speed up their reply and one week later they made a brief reply to Bramston's most important memorandum.<sup>28</sup> They assented to his statement of the law. They had always maintained that jurisdiction could be obtained by consent and such consent was given in the general acts of the Berlin and Brussels conferences. Only a few minor limitations were placed on Bramston's report, mainly with the intention of limiting some of the assertions about protectorates generally to protectorates within the area covered by the two general acts. So the lawyers, while still maintaining the correctness of the earlier decisions, bowed to the pressure of events and authorized a more convenient and practical approach to protectorates.

Bramston was satisfied with this answer, as far as it went.<sup>29</sup> But he was displeased with the territorial qualification and argued that the consent given on the occasion of the two general acts established a principle which might be applied generally. Davidson, at the Foreign Office, was surprised at the change of heart displayed by the lawyers.<sup>30</sup> "Having regard to the views

27. Loch to Knutsford, April 7, 1891, C.O. 417/55/7024; Hole, *Making of Rhodesia*, pp. 266–75.

28. Webster, Clarke to Knutsford, April 17, 1891, C.O. 417/69/7848.

29. Minute, Bramston, April 18, 1891, C.O. 417/69/7848.

30. Minute, Davidson, May 29, 1891, F.O. 64/1404.



which they have previously expressed . . . I was somewhat astonished to hear that they had done so."

The law officers' opinion meant that the Colonial Office could proceed with the declaration of a protectorate in Matabeleland and other areas south of the Zambesi. So final details of the proposed Order in Council were being discussed with this in view when a further problem arose in Africa. Lobengula was proving refractory in giving his consent to the grant of any further jurisdiction over whites; he complained that he was being constantly troubled on the subject.<sup>31</sup> Loch had informed the Matabele king that the high commissioner acting on behalf of the British crown governed and would punish whites in his territory if necessary. But now that Lobengula appeared reluctant to make further concessions it seemed undesirable to proceed with an actual proclamation of a protectorate over those territories. Yet the lawyers' approval seemed based upon the existence of a protectorate—and one based upon the formalities set out in the Berlin Act. This meant notification was necessary. Knutsford hoped this point might be glossed over; he reasoned that from the correspondence passing between Loch and the Matabele king about jurisdiction over whites one might assume jurisdiction arising by "sufferance" on the part of Lobengula. So an actual agreement signed by the king or the proclamation of a protectorate would not be necessary for the British government to proceed in the exercise of its jurisdiction under the Foreign Jurisdiction Act of 1890.

The Foreign Office acceded to this legal side-step but the law officers would not.<sup>32</sup> Although they agreed to the final terms of the Order in Council they denied that it could be validly applied to affect the subjects of other powers without first a declaration being made of British protection. The consent that arose from the terms of the two general acts could not be held to exist in respect of territories that had not been declared to be under

31. Telegram, Loch to Knutsford, April 20, 1891, minute, Knutsford, April 21, 1891, C.O. 417/57/7986.

32. Salisbury to Knutsford, April 24, 1891, C.O. 417/70/8364; Webster, Clarke to Knutsford, April 30, 1891, C.O. 417/69/8790.



protection. But the Colonial Office would not be deterred by this new legal difficulty. Still avoiding the necessity of actually declaring a protectorate there Knutsford smartly suggested that for the time being they would merely declare in the recital of the Order in Council that the area was "under the protection" of Britain.<sup>33</sup> If a difficulty arose later they could then proceed with the declaration of a protectorate. So through a play on words the Colonial Office was able to avoid legal complications and achieve the practical solution desired for the situation.

The exercise of British jurisdiction over the area north of the colony of British Bechuanaland and south of the Zambesi was provided for in the Order in Council issued in May 1891.<sup>34</sup> Its eastern boundary was the Portuguese possessions and the South African Republic and in the west it extended to the German protectorate. In form it was much simpler than the corresponding orders issued by the Foreign Office for the exercise of jurisdiction in Africa. It was designed to be brief and general, conferring jurisdiction on the high commissioner and empowering him to administer justice for "all persons."<sup>35</sup> But in the instructions that accompanied the order the high commissioner was advised to use caution in the introduction of law and courts into the area.<sup>36</sup> Parliament provided no money for the maintenance of such courts because the intention of the government was that the resources and instrumentalities of the British South Africa Company should be used as much as possible. Although the order claimed jurisdiction over all, the Colonial Office recommended that the high commissioner should confine the exercise of his authority and the application of law as far as possible to whites, leaving the native chiefs and those living under their tribal authority almost entirely alone. This was because the extent of jurisdiction held by Britain over natives had not yet been accurately defined.

33. Minute, Knutsford, May 1, 1891, C.O. 417/69/8790.

34. Order in Council, May 9, 1891.

35. Minute, Herbert, February 20, 1891, C.O. 417/69/4373.

36. Knutsford to Loch, May 15, 1891, Knutsford to British South Africa Company, May 12, 1891, C.O. 417/69/9715; minute, Knutsford, June 13, 1891, telegram, Knutsford to Loch, June 16, 1891, C.O. 417/59/11892.

This revision of legal theory marked a major break-through for protectorate administration. Credit was due largely to Bramston for his well-reasoned memorandum; but Fairfield also was an instrumental partner providing an early lead and ideas. And but for the interest of Knutsford and his persistent searching for a satisfactory solution to the jurisdiction question the whole matter might not have been brought to a successful close. The role of the law officers was minimal. They neither took the initiative nor provided the ideas; rather they were led to the revision by the Colonial Office, in particular by its main legal adviser, Bramston.

The order was permissive or enabling in intent; jurisdiction could be exercised by the high commissioner when it was deemed necessary but he was warned not to incur unnecessary or extra expense without sanction from London. The order was applied immediately to Mashonaland because of the presence of the company's settlers. But it was not extended in practice to Matabeleland. Two years later, when the Matabele war broke out, the order still had not been put into operation in that area; neither the high commissioner nor the British South Africa Company had found it necessary or wise to exercise jurisdiction in Lobengula's territory. But the government did have the legal authorization to step in if necessary. The Colonial under-secretary, Buxton, told the House of Commons in 1893 that if, with the defeat of the Matabeles, it became inevitable that Britain would have to assume an active exercise of jurisdiction there the necessary machinery was already provided by the 1891 order and the charter of the company.<sup>37</sup> It was the government's intention that the company should carry the main task of administration so that the powers which by the order were to be exercised by the high commissioner or the British government were seen to be held in reserve for an emergency.<sup>38</sup> In actual fact the intention and effect of the order was to give a legal foundation to the de facto administration established by the company over all persons, or at least certainly over all whites.

37. Buxton, December 4, 1893, 4 *Parl. Debs.*, XIX (1893-94), 373.

38. Minute, Fairfield, November 13, 1893, Chamberlain MSS, JC 10/8/1/2.

In 1893 there were serious clashes and disturbances between Lobengula's followers and weaker tribes over cattle-stealing. These confrontations finally resulted in a war by the company to reduce Lobengula to a state of peace and order. Lobengula's followers were no match for the Europeans and were subjugated. In 1894 a settlement was reached for Matabeleland and an Order in Council issued;<sup>39</sup> in fact it also applied to Mashonaland and Manicaland. It used as its basis the 1891 order and provided for the company to take prime responsibility for the general administration of the area. Legislative power was divided between the crown and the company; a high court was created; and special clauses were added providing protection for natives—in matters of justice and in land settlements. Following the 1891 lead the high court was granted full civil and criminal jurisdiction over all persons but in civil cases between natives the application as far as possible of native law and custom was urged. The 1894 order amounted in fact to a further employment of the principle established three years earlier but caution was still evident so far as concerned relations between whites and the natives. Further Orders in Council were subsequently issued for the area—in 1898 for Southern Rhodesia, in 1899 for Northwest Rhodesia, and in 1900 for Northeast Rhodesia. These orders provided more detail on legislative and administrative arrangements but did not spell out in any greater measure the nature of jurisdiction and protection.

Meanwhile, the Foreign Office, heartened by the success of the Colonial Office in this problem of jurisdiction, thought it an opportune moment to revise their jurisdictional operations in Africa. Consequently in 1892 a new Order in Council issued updating the 1889 Africa Order in Council.<sup>40</sup> The new order adopted the revised legal theory assuming jurisdiction over foreigners who were subjects of the signatory powers of the General Act of the Berlin Conference. During the course of preparation Albert Gray, the parliamentary draftsman, raised a further question with

39. Order in Council, July 18, 1894. Refer to Palley, *Constitutional History*, pp. 114–19, for a more complete discussion of the details of this order.

40. Africa Order in Council, June 15, 1892.

the Foreign Office as to whether it was prepared to undertake the administration of justice as between native and native if the British courts became popular.<sup>41</sup> This was the next logical step after the assertion of jurisdiction over foreigners. Davidson informed Gray that this matter should be left to individual arrangements with each chief.<sup>42</sup> So the order merely provided for the exercise of jurisdiction over the subjects of the signatory powers of the Berlin Conference. The approval of the Treasury, the Home Office, the Colonial Office, and the India Office was obtained; then the law officers were approached for their approval and finally the order issued.<sup>43</sup>

Although legal approval was being readily granted in the case of jurisdiction over foreigners (with the possibility being mooted that this might be extended to natives) the law officers had not completely succumbed to propositions having general application to all protectorates. They still looked for authorization in facts like the two general acts of Berlin and Brussels. And at the end of 1892 they reasserted the necessity of acquiring jurisdiction by grant or otherwise from the protected power;<sup>44</sup> they would not allow that jurisdiction automatically arose through the mere existence of a protectorate. Their report followed on from a problem about the operation of British consular courts in the French protectorate over the island of Madagascar. A dispute arose between the British and French governments about the surrender to French tribunals of British extraterritorial jurisdiction over British subjects acquired in 1865. Although the French government had been engaged in establishing its "protection" over the island since 1885 and the British government had agreed to recognize the protectorate in 1890 the local native government was refusing to acknowledge the French action and was keeping open its external relations. But the French government persisted in its course with a decree establishing a constitution and a system of French law and courts. The British law

41. Gray, see Appendix; Gray to Bergne, December 1, 1891, F.O. 84/2274.

42. Gray to Bergne, December 4, 1891, F.O. 84/2274.

43. Webster, Clarke to Salisbury, June 15, 1892, F.O. 84/2274.

44. Russell, Rigby to Rosebery, November 16, 1892, F.O. 834/17.



officers thought that the French government could not demand or expect the surrender of British extritorial rights which had been established before the French protectorate was proclaimed and which surrender had not been consented to by the Malagasy government which had granted them. The French expectations proceeded on the ground that the very existence of a protectorate created the necessary jurisdiction but the law officers would have none of this argument:

It would seem that the French Government assume that jurisdiction to arise by reason of their Protectorate. It cannot yet be treated as an established doctrine of international law that such a jurisdiction can be founded on the assumption of a Protectorate without a grant from the protected Power whose right depends upon territorial sovereignty.

But international law was still developing and it was only a matter of time before the lawyers' limitations were further whittled down. Four years later, in 1896, an Order in Council was being drafted to regulate the exercise of jurisdiction in the East Africa Protectorate. By this stage the issue of jurisdiction over foreigners was taken to be quite settled. Gray, the draftsman, fully endorsed the desire of the government that jurisdiction should be exercised over all foreigners in East Africa and decided to widen the scope of the order beyond the subjects of those powers who had implied their consent by signing the Berlin and Brussels acts.<sup>45</sup> He thought no difficulty need arise in the case of the nonsignatory powers. The French and German governments had made their policies quite clear in their protectorates where other powers were not permitted to exercise extritorial jurisdiction—that all foreigners were within the jurisdiction of their courts. A similar situation had arisen under the 1891 South Africa Order in Council where jurisdiction over all persons within the limits of the order was assumed. So, arguing on the same basis that the crown's rights in the East Africa Protectorate were similarly exclusive Gray provided that the order should apply to all foreigners whether or not they were subjects of the signatory nations.<sup>46</sup> In most of the protectorate no other powers held ex-

45. Notes on draft Order in Council, Gray, March and May, 1896, F.O. 2/142.

46. East Africa Order in Council, 1897, art. v.



territorial jurisdiction but in the case of the Zanzibar territory within the protectorate he had to add a proviso. There the question of jurisdiction over foreigners was complicated by the existence of extraterritorial jurisdiction held by foreign powers before British protectorate rights were recognized. In this case application to foreigners was limited by their consent.

While the Colonial Office was forging new jurisdictional developments for southern Africa which the Foreign Office was following up for the rest of Africa there was a time-lag in the transfer of these developments to the Pacific. Although a number of calls for a new initiative in jurisdictional matters came from the area there was a tardiness in the Colonial Office to find a satisfactory answer. Certainly that department displayed no enterprise or ingenuity in devising new answers and when, in due course, it did update its jurisdictional position in the Pacific it was largely a wholesale transfer of the African model without modification, revision, or improvement.

The same problems of the early 1880s continued since the lack of jurisdiction over natives outside the British dominions was not remedied. There were a number of serious deficiencies in the existing arrangements provided under the Western Pacific Orders in Council. For example, a native offender might be caught within the high commissioner's jurisdiction and tried and found guilty of the commission of a violent crime against a British subject. But a serious loophole existed; there was no authority to take the native to Fiji for detention.<sup>47</sup> So around the Pacific the only practical course open was the time-honored method whereby naval officers treated native offences as acts of war and shelled villages as a whole. On a few occasions naval officers had sought to follow a slightly more humane and just course; they made enquiries at the scene of the outrage, captured the offending persons, and punished them, sometimes capitally, without any legal trial. This more humane action, however, had one disadvantage; it was illegal and made the officer liable to a charge of murder.

The basic principle determining Colonial Office attitude to-

47. See complaints of High Commissioner Thurston and his suggested remedies, Thurston to Knutsford, March 11, 1890, C.O. 225/34/7945.

wards these Pacific problems was the clear, legal statement made in March 1879 denying the right of the crown to assume jurisdiction over foreigners not within any part of the British dominions. At the same time a number of important cases had arisen in the intervening years throwing serious doubt on the wisdom and practicality of this principle. There were well-known cases—like the *Beagle* case of 1878 and the *Daisy* case of 1885—which illustrated the dilemma of proceeding by act of war or individual punishment. The matter was resurrected in 1890 in the *Royalist* case where Captain Davis had shot three natives for the murder of a British subject in the New Hebrides, an area of continual friction and trouble.<sup>48</sup> The legality of his action was questioned in the Colonial Office since it was obviously not an act of war. A reference was made to the law officers on the whole question.<sup>49</sup> Could the commander of a force engaged in warlike operations undertaken for the purpose of punishing an act of violence against British subjects lawfully limit the operations to the personal punishment of the perpetrators of the act of violence or was he obliged to inflict punishment upon the tribe by indiscriminate destruction of property and possibly of human life? Attention was drawn to the particular situation in the Pacific where the tribes were savage and unused to the methods of civilization, including the methods of civilized warfare.

It must however be remembered that the operations of Her Majesty's ships in these cases although acts of war, are carried out against savage tribes to whom the usages of civilisation are unknown, and from whom a captured sailor would inevitably receive most barbarous treatment.

The law officers sought to find a suitable justification for the action of the naval captain but could do so only by treating the case as an exceptional one.<sup>50</sup> They thought that "having regard to the circumstances of the case" the captain's conduct was justifiable as being an act of retaliation although as a general

48. Thurston to Knutsford, December 23, 1890, C.O. 225/34/7945; for background on naval punishment see Scarr, *Fragments of Empire*, pp. 167-75.

49. Knutsford to Webster, Clarke, July 9, 1891, C.O. 225/37/7681.

50. Webster, Clarke to Knutsford, August 20, 1891, C.O. 225/37/16884.

principle it was quite clear that the execution could not be justified as an act of war. The upshot of the lawyers' report was that the Colonial Office was convinced that definite instructions covering this problem should be prepared for naval officers and that the conveyance of natives to Fiji and detention there as prisoners of war should be legalized. The Admiralty at first hesitated in approving these plans, arguing against the imposition of new duties and responsibilities upon naval officers;<sup>51</sup> eventually it was persuaded to accede to the Colonial Office wish.

A local (Fiji) ordinance was then prepared, authorizing but not making obligatory the conveyance and detention on board ship of prisoners; and it protected naval officers performing this task from legal action. The Colonial Office felt pleased with "this rather bold piece of legislation" which offered naval officers an alternative to the execution of natives who were difficult to dispose of otherwise than by act of war.<sup>52</sup> At the same time it was not an original, legislative device because similar ordinances had been passed lately in other colonies for the detention of various persons who could be described as political prisoners. The colonies of Mauritius, Gibraltar, Gold Coast, St. Vincent, and St. Helena had adopted such measures. In the light of this information the law officers unhesitatingly gave their approval. Accordingly the Admiralty issued new instructions to its officers thereby settling one aspect of the jurisdictional problem—the power of detention and the exercise by naval officers of their patrol duties among the Pacific islands. In future, if a native had committed an outrage in an island outside the British dominions upon the subject of a civilized power he could be apprehended by a British naval officer as a prisoner of war; if the officer was satisfied as to the prisoner's guilt he could bring the latter to Fiji for detention; the high commissioner could then investigate the evidence to determine whether the detention was justified and if so for how long.<sup>53</sup> No judicial trial could be held since the

51. Admiralty to Knutsford, April 16, 1892, Knutsford to Admiralty, June 8, 1892, C.O. 225/40/7571.

52. Minute, Fuller, July 21, 1892, C.O. 225/40/14624; Russell, Rigby to Ripon, August 16, 1892, C.O. 225/40/16566.

53. Ripon to Thurston, September 7, 1892, C.O. 225/40/16566.

native was regarded as a prisoner of war but this arrangement did have the advantage over the former system of act of war in that the person responsible was singled out to suffer punishment instead of the whole village.

So an advance was made with respect to British control over natives but the basic problem had not been removed because legal theory still denied the assertion of jurisdiction over natives without the establishment of rights of sovereignty. Likewise, the question of jurisdiction over foreigners which had plagued African protectorates in the 1880s and was settled in 1891 was still resolved negatively in the Pacific. But the whole problem came up for review finally with the issue of a new western Pacific Order in Council in 1893. The deficiencies of the 1877 order had been apparent almost from the very beginning, and in 1887 its revision came up again for serious consideration. It was four years since the western Pacific committee had made recommendations on the problem but that report had fallen into the forgotten files of the office. The initiative for a further look at the Order in Council came from a report by Berkeley, the acting chief justice at Fiji.<sup>54</sup> He complained that the high commissioner had been acting *ultra vires* in the exercise of the judicial powers when outside the territorial limits of the western Pacific as defined in the order. If true, this opinion raised serious obstacles in the minds of Colonial Office administrators to a practical system of operations in that area. The matter was further complicated when the law officers confirmed the line of argument taken by the judge;<sup>55</sup> they agreed that the high commissioner's judicial or quasi-judicial acts could only be performed when he was within the territorial limits assigned by the order. To overcome this difficulty it seemed necessary to issue another Order in Council. Although Herbert doubted the correctness of the law officers' report—he found the opinion “a singular one”—Knutsford decided that the best policy to remove all inconvenience was to prepare a new Order in Council.

54. Mitchell to Holland, December 8, 1887, C.O. 225/24/2676.

55. Webster, Clarke to Knutsford, March 28, 1888, minutes, Herbert, April 12, 1888, Knutsford, April 16, 1888, C.O. 225/28/6044.



Bramston attended to the preliminary drafting of the order.<sup>56</sup> Instead of adding another order for the western Pacific it was decided to consolidate the three existing ones; at the same time the territorial limits and the powers of the high commissioner could be redefined in line with the changing circumstances of the Pacific. For instance, the German sphere of influence needed to be omitted since now a civilized government was operating in that area; and it was necessary to add to the high commissioner's powers so that he might exercise them when outside the territorial limits of the order.

The final settlement of the draft order was carried out by Wright and in place of Bramston's draft amending and consolidating the existing orders he substituted a new form containing more modern clauses and enlarged powers.<sup>57</sup> In this regard he was able to draw upon his knowledge of recent developments in orders for other areas where he had assisted the preparation. Basically for the western Pacific he made an adaptation of the Africa Order in Council of 1889, the draft of which he had recently completed, with modifications as required by local circumstances and by the Pacific Islanders Protection Acts.<sup>58</sup> Although the new draft was "more comprehensive and elastic" than the existing Pacific Orders and afforded the high commissioner larger and more general powers Wright did not introduce any new matters of principle which had not already been fully considered by the Foreign Office and the law officers in relation to the Africa Order.

The completion and issue of the order was delayed for over three years—until March 1893. Part of the delay was due to an interruption by the elevation of Wright to the Bench in 1890 but he completed the drafting as a judge. There were also protracted negotiations between the Colonial Office, the Admiralty, and the Foreign Office about the powers to be exercised. In addition to the position of the high commissioner and his court it was thought necessary to extend the powers of the deputy commis-

56. Minute, Bramston, July 26, 1888, C.O. 225/28/6044; also Knutsford to Salisbury, January 30, 1889, F.O. 58/273.

57. Wright to Knutsford, August 15, 1889, C.O. 225/31/16231.

58. Note on western Pacific Order in Council, December 14, 1889 in Wright to Wingfield, December 17, 1889, C.O. 225/31/24240.



sioners, naval officers, and the Supreme Court of Fiji. There were also local problems in Tonga and elsewhere that slowed down the finalization of the order. Like the previous orders it derived authority from the Pacific Islanders Protection Acts and the Foreign Jurisdiction Act of 1890. Furthermore, authority was taken under the British Settlement Act of 1887 so far as related to settlements which had become British possessions. As Bramston commented "we want all the jurisdiction we can get."<sup>59</sup>

Since it was a matter of increasing concern in African protectorates it is not surprising that the question of jurisdiction over foreigners was raised by 1892 in the Pacific case. At the Colonial Office it was felt that Bramston had already settled the issue positively the previous year, and with the approval of the law officers.<sup>60</sup> That reference, however, concerned only African protectorates within the scope of the acts of the Berlin and Brussels conferences and no mention had been made of the Pacific. From a practical point of view it was believed in the Colonial Office that the German government probably would not object to a reciprocal arrangement for the trial of each other's subjects in the Pacific. But from a theoretical point of view it was not so obvious that the law officers would not object. The Colonial Office, for reasons of administrative efficiency, wanted to proceed upon the assumption that the mere establishment of a protectorate conferred on Britain the desired jurisdiction over foreigners (and possibly over natives). At the Foreign Office Davidson doubted the validity of this assumption;<sup>61</sup> he argued that such jurisdiction could be obtained only by an explicit or implied (assumed) grant by the protected sovereign or chief in whom such jurisdiction was (at least in theory) originally vested. The grant could not be assumed to arise *ipso facto* by the bare assumption of a protectorate. The law officers had only very recently—two months earlier in June 1892—stressed this point in the Foreign Office reference on foreigners in Madagascar.

59. Minute on Wright's draft Order in Council, Bramston, April 6, 1891, C.O. 225/37/6701.

60. Minute, Mercer, March 19, 1892, C.O. 225/38/5160.

61. Minute, Davidson, August 23, 1892, Rosebery to Ripon, August 26, 1892, F.O. 58/273.

The Colonial Office presented its case to the law officers hoping to convince the latter that the case under review was a special category where the kind of society and civilization required a more flexible approach breaking away from traditional, legal concepts.<sup>62</sup> The special category referred to was islands (or territory) inhabited by native tribes and under no civilized government. The argument proceeded on the basis that when an uncivilized tribe asked for or accepted the protection of a civilized state the very assumption of a protectorate by the latter carried with it the acquisition of so much of the sovereignty of the uncivilized state as was necessary to make the protection effective. Included within that was the power to deal judicially with persons of any nationality who might oppress or mistreat the subjects of the protected state or might commit crimes against the person or property of other foreigners. The courts of the ruler of such a protected state were considered not competent to handle such legal cases.

The doubts held by the Foreign Office were echoed by the law officers.<sup>63</sup> They started with the orthodox legal theory that the assent of the foreign sovereign was required. This assent was inferred by the Berlin Act of 1885 in the case of certain protectorates, but the lawyers thought it was going a "considerable step further" to imply the assent in cases outside Africa. Surprisingly, however, the lawyers then went on to agree with the Colonial Office proposition. They gave their acquiescence on practical grounds; if it was "thought advisable as a matter of policy" one could assume that the signatories of the Berlin Act would not object to the exercise of jurisdiction over their respective nationals. So, following the precedent of the Berlin Act and taking account of the practical needs of the case the law officers agreed to the assumption of jurisdiction over foreigners in the Pacific. The position with respect to natives, however, did not change with this reference; basically, this was still to be determined by the treaties made with the local sovereign power.

62. Ripon to Russell, Rigby, August 20, 1892, C.O. 225/41/13964.

63. Russell, Rigby to Ripon, November 17, 1892, C.O. 225/40/22487.

The new order issued in March 1893.<sup>64</sup> It was to extend to the whole of the Pacific and not only the western Pacific as had previously been the case and it covered three types of islands where British jurisdiction was concerned.<sup>65</sup> Firstly, in the case of islands inhabited by native tribes and under no civilized government where no British protectorate had been established, jurisdiction could only be exercised over British subjects and such foreigners and natives as owed a duty of allegiance to the British crown. On this point there was a difference of opinion between the Colonial Office and the law officers about jurisdiction over persons naturalized in nearby colonies.

Secondly there were those islands which had become part of Her Majesty's dominions and had been licensed for limited periods to British subjects for the purpose of collecting guano, planting coconut trees, or operating other such industries. Because of their geographical position they were practically exempt from the jurisdiction of any court. But at law they were regarded as British settlements and now it was decided that the new order might be extended to them under the provisions of the British Settlements Act of 1887. Since they were British territory all persons found therein were subject to the jurisdiction of the relevant British courts. This removed the problem of jurisdiction in the numerous, small, scattered guano islands across the Pacific.

The third category was that of islands over which a British protectorate had been declared. Now the law officers accepted the arguments of common sense and convenience that Britain had jurisdiction over foreigners. This had been a triumph for Bramston and his opinion of 1891 expressed for the African situation. Two years later the principle accepted for one area (Africa) and under special circumstances (specific legislation) was extended to an area not comprehended within the first set of circumstances. Thereafter the principle of jurisdiction over foreigners took on a general acceptance for all areas—in law as well as in practice.

64. Order in Council, March 15, 1893; further Law Office approval of the terms of the order had been obtained, Russell, Rigby to Ripon, January 19, 1893, C.O. 225/43/1075.

65. See instructions in Ripon to Thurston, March 29, 1893, C.O. 225/43/4979.

And it was only another two years before the general acceptance of the idea of jurisdiction over foreigners led to the first official, legal approval of jurisdiction over natives, although not at that stage as a matter of general application. The matter had not been specifically raised in 1891 and so no definite legal pronouncement had been made. The 1891 Order in Council had left the matter vague but wide open although the instructions sent to the high commissioner suggested that he should not interfere in native cases unless it was unavoidable. Yet all the indications were present that this would be the next area of jurisdiction to be investigated and formalized. When the Matabeleland Order in Council issued in 1894 a high court was created with jurisdiction over all persons including natives but there was still the practical, administrative injunction to avoid interference as much as possible. Nevertheless for administrative purposes it was quite plain that the issue was settled in favor of the principle that jurisdiction could be exercised over natives. But no specific legal approval had yet been given on that particular point. This was obtained in 1895 when a problem of jurisdiction arose in the Gold Coast colony and its adjoining "protected" areas.

Increasing incidents of slavery, pawning, and general corruption in the territory of Kwahu, adjacent to the Gold Coast colony, had led the governor of the colony to claim a greater control over that area. A treaty had been signed in 1888 with the king and chiefs of the territory putting it under British protection but making no provision conferring jurisdiction in civil or criminal matters on Her Majesty. The chiefs were reluctant to give up civil jurisdiction in particular because it was a lucrative source of revenue for them. But the colonial administrators were finding these haphazard arrangements unsuitable and in 1893 were asking for general jurisdiction over all persons including natives;<sup>66</sup> they also pressed for a general right to take executive action so as to prevent trouble and injustice. In addition, the chief justice of the colony was calling for a definite statement from the colonial

66. Griffith to Ripon, February 10, 1893, C.O. 96/231/4688; Hodgson to Ripon, August 17, 1893, C.O. 47/235/16651.



secretary as to the jurisdiction of his court in the area; he believed he had none while F. M. Hodgson, acting for the governor, argued that his government had acquired legal jurisdiction over Kwahu by implication and sufferance and supplied two instances to verify this.

The Colonial Office was not anxious to extend jurisdiction into this area unnecessarily and let the question drag.<sup>67</sup> In Bramston's mind there was no justification for a general extension over natives. He thought that the law officers since the 1870s had answered this question and with no element of doubt. Jurisdiction could not be acquired over other than British subjects except by treaty with the ruler of the country—or in the case of foreigners, except by consent. The treaty with Kwahu did not confer such jurisdiction and so Bramston recommended that no steps be taken. The 1891 memorandum did not apply to this situation. Looking at the background of events that pertained in Kwahu Bramston thought it was clear that the chiefs had not agreed to Britain's exercising civil jurisdiction; in criminal matters there appeared to exist more grounds for asserting that the natives were prepared to recognize the authority of British courts. "That being so I think the Court may safely deal with any cases from Kwahu that may be brought before it."<sup>68</sup> Such condonation of some criminal jurisdiction was of definite advantage to the needs of local administrators.

For the next eighteen months arguments were produced by interested parties on both sides—supporting and denying the existence of an appropriate jurisdiction. The colonial administrator produced evidence supporting the existence of jurisdiction acquired by sufferance while the chief justice denied that his court had any jurisdiction, whether civil or criminal, in the territory.<sup>69</sup> With such a conflict of opinions Bramston, perhaps deliberately, let the matter rest for almost twelve months. But in

67. Minutes. Hemming, April 17, 1893, Bramston, April 19 and May 16, 1893, C.O. 96/231/4688.

68. Minutes, Hemming, October 4, 1893, Bramston, October 11, 1893, Ripon to Hodgson, October 19, 1893, C.O. 47/235/16651.

69. Hodgson to Ripon, February 14, 1894 (enclosing correspondence with chief justice), C.O. 96/234/4626.



the meantime he had been settling a protectorate problem in the Gambia, the successful conclusion of which indicated the growing willingness of the law officers to give approval to matters involving considerations of practical and administrative convenience.

The Gambia case illustrated well the working of the Foreign Jurisdiction Act of 1890 and of the Colonial Office approach to protectorates since 1891. Llewellyn, the administrator of the colony, and the chief magistrate asked the Colonial Office to make a formal answer to the question of the jurisdiction of the courts of the colony in the adjacent territory.<sup>70</sup> After a convention was signed between France and Britain in 1889 a British area of influence was demarcated but no formal protectorate was proclaimed even though local chiefs entered into friendly relations with British authorities. One such area was Suwarrakunda well outside the colony but within the adjacent area of British influence. A native had murdered his wife and the local ruler was detaining him, pending instructions from the colonial administrator. The latter was in doubt as to the jurisdiction of the British courts.

The Colonial Office seemed rather certain that British jurisdiction did exist although it seemed worthwhile to obtain formal confirmation from the law officers. The reference relied upon the 1890 Foreign Jurisdiction Act and an Order in Council of 1893 for the exercise of Her Majesty's jurisdiction in territories adjacent to the colony.<sup>71</sup> Under the latter the Legislative Council of the colony was authorized to exercise British jurisdiction in the territories adjacent and the courts of the colony were given jurisdiction as though the case had occurred in the colony. The Order in Council did not spell out what persons were subject to this jurisdiction but the Colonial Office considered it should include British subjects, the subjects of those foreign powers that signed the Berlin and Brussels Conference Acts, and those natives in the

70. Llewellyn to Ripon, February 14, 1894, C.O. 87/145/3868; for background on the British protectorate, see Harry A. Gailey, *A History of the Gambia* (London: Routledge & Kegan Paul, 1964), chaps. vi-vii.

71. Ripon to Russell, Rigby, March 14, 1894, C.O. 87/147/4551; Order in Council, November 23, 1893.

territories who submitted to British jurisdiction. Various instances were given from which it could be assumed that a protectorate had in fact been established. For example the British government was interfering through travelling commissioners in the administration of the area, especially with regard to the suppression of the slave trade. Furthermore the native ruler acquiesced in such British activity and seemed to regard the queen as having sovereign rights although this had not been accepted by the British government.

In the light of such British interference and local acquiescence the law officers did not hesitate in endorsing the Colonial Office approach that Britain could exercise jurisdiction over natives (such as the one currently detained):<sup>72</sup>

. . . we are of opinion that the Secretary of State will be justified in considering these facts as establishing that Her Majesty has *de facto* jurisdiction in the territory and over the matter in question within the meaning of the statute of 1890, and that the Supreme Court of Gambia may try the native in question.

This was a useful opinion which the law officers had worked out after a conference with the colonial secretary, Lord Ripon, and Bramston. It was of more than local significance in that it allowed on the evidence of the facts the easy creation of a protectorate, through tacit acquiescence of the ruler and inhabitants, and that this acquiescence included the submission of the natives to British courts. Formalities were at a minimum; the existence of a protectorate was held to be determined by local circumstances and the actions of the British government. This was not a new statement of principle when one looks at the rise of "protected" and adjacent territories of influence along the West African coast in the 1840s but it was a timely restatement of that earlier position and a corrective to the more hardened and formalized position on protectorates enunciated in the 1880s. The dominant note in settling the reference had been flexibility and practicality.

When, early in 1895, the Gold Coast problem was once more

72. Russell, Rigby to Ripon, March 14, 1894, C.O. 87/147/4551.

brought to the attention of Bramston he considered that the law officers might display a similar amenability to the question of the assumption of a general jurisdiction over natives in a protectorate.<sup>73</sup> Instead of asking the law officers an open-ended question on British rights Bramston prepared a draft despatch to the governor wherein the Colonial Office set out the legal position it desired. He hoped the law officers would merely approve the statement without making a full examination of the principle involved. In this manner Bramston hoped to take "a step further in the assertion of jurisdiction in an uncivilized protectorate."

In his determination to make the exercise of jurisdiction in a protectorate as fully effective as possible Bramston resorted to all the recent arguments in favor of an extended jurisdiction.<sup>74</sup> For his basic principle he relied upon the assertion that the existence of a protectorate in an uncivilized country carried with it a right on the part of the protecting power to exercise such authority and jurisdiction—in effect, such of the attributes of sovereignty—as were necessary for the due discharge of the duties of a protector. These duties included not only protecting natives from the subjects of civilized powers and such subjects from the natives, but also protecting the natives from the grosser forms of ill treatment and oppression by their rulers, from raids by slave dealers and marauders.

This formulation was a rephrasing of the Colonial Office case put to the law officers in 1892 in respect of the Pacific Order in Council. In addition, recent developments over all Africa had influenced Bramston in the preparation of this case. Apart from the problem of the Gambia in 1894 he sought to find parallels with the Matabeleland case of 1894. The defeat of the Matabele and the death of their ruling chief made it necessary for the British government to establish an effective protectorate in the interest of all persons therein and to provide for the administration of the country without proceeding to the assumption of sovereignty. But the analogy was not a good one since in the Gold

73. Minute, Bramston, January 23, 1895, C.O. 96/243/4626.

74. Ripon to Reid, Lockwood, January 26, 1895, C.O. 96/243/4626.

Coast case the problem arose not from a native power vacuum but from poor government by the native ruler.

The law officers did not accept without question Bramston's statement of the law. Initially the attorney-general took an apologetic line explaining that the subject was "not very definitely explained in authorities or exhaustively treated in text books."<sup>75</sup> "I should like to know the views of my predecessors" and opinions earlier than 1892 were requested from the Colonial Office files. These opinions seem only to have brought further confusion to the law officers and shortly afterwards they replied that they took no objection to Bramston's definition of the law.<sup>76</sup> This opinion appeared very much as one extracted skilfully by Bramston directing the operations and without a full consideration by the law officers of the theoretical background. Three years later, Halsbury, the lord chancellor, was to comment severely upon this decision and its authors: ". . . in strict confidence Reid [the attorney-general] though a very excellent fellow and a good English lawyer is [not] and never has been an authority upon international law etc. and Lockwood [the solicitor-general] I do not think he knew much law of any sort."<sup>77</sup> Halsbury may have been a little harsh in his judgement. Reid did go on to become lord chancellor and participated in international arbitrations; but as attorney-general he was not distinguished as an international lawyer. Certainly Lockwood did not achieve fame as a lawyer of any sort although he was well-known for his sketching talents.<sup>78</sup>

But no matter how suspect the report it had now been accepted in law that the very existence of a protectorate in an uncivilized country carried with it the right to assume whatever jurisdiction over all persons might be necessary for the effectual exercise of protection. The law officers admitted that in making such an assertion they were departing from the opinions of some of their predecessors. This constituted "an acceptance of a legal doctrine

75. Reid to Meade, January 31, 1895, C.O. 96/263/1967.

76. Reid, Lockwood to Ripon, February 14, 1895, C.O. 96/263/2865.

77. Halsbury to Chamberlain, February 11, 1898, Joseph Chamberlain papers.

78. Gilchrist Alexander, *The Temple of the Nineties* (London: W. Hodge & Co., 1938), p. 256; Augustine Birrell, *Sir Frank Lockwood: A Biographical Sketch* (London: Smith, Elder & Co., 1898), p. 201.



not hitherto unequivocally accepted by Great Britain." But they thought Bramston's legal views were "sound at the present day" and for this they drew support from the views expressed by William Hall in his book, *A Treatise on the Foreign Powers and Jurisdiction of the British Crown*, published the previous year.<sup>79</sup> There it had been claimed that since 1885 Britain had been assimilating its practice to that of Germany and France and that the view of those two nations was the true one. The law officers, however, did not bother to report the rest of Hall's statement—"that there are still considerable differences both between some of the British protectorates and those of other nations, and between British protectorates themselves." It suited the nature of the case for the law officers to rely only on the first part of Hall's statement of the growing assimilation.

New instructions were sent to the governor of the Gold Coast where it was pointed out that British courts of justice could be established within the protectorate even though no such provision had been made in the original treaty.<sup>80</sup> But that treaty, through the very creation of a protectorate, gave to Her Majesty the right of administering justice so far as circumstances might render it desirable. So the Supreme Court did possess civil and criminal jurisdiction. But this did not necessarily oust the jurisdiction of the traditional native courts. The latter would continue but the hope was expressed that "the purer administration of the British Court [would] in time of itself supplant the methods of the native courts." The governor was instructed that the policy of the government and of the courts should be to assert jurisdiction whenever possible and "to encourage the natives in every way to seek redress in the British courts. . . ." This seemed a very assertive statement of policy on the part of the Colonial Office and was in marked contrast to the cautious attitude expressed, for example, by Lord Chancellor Selborne in 1885 about the responsibility of Britain in its African protectorates.

Both the Colonial Office and the Foreign Office welcomed the

79. William E. Hall, *A Treatise on the Foreign Powers and Jurisdiction of the British Crown* (Oxford: Clarendon Press, 1894), p. 218.

80. Ripon to Griffith, March 11, 1895, C.O. 96/264/4255.



direction that legal theory was taking. In the former the law officers' report was described as a "decided step in advance."<sup>81</sup> The Foreign Office praised the practical good sense of the decision:

It may be that in the present state of the evolution and development of protectorates it will be good policy to modify and extend—in the direction of French and German jurisprudence—our earlier views of the jurisdictional position of the protecting power which were certainly much narrower and limited than those of France and Germany.<sup>82</sup>

Davidson, although he personally agreed with the stand taken by the law officers, was afraid that it went further than the position endorsed by Hall and far beyond previous legal opinions. In particular, since it overruled the opinion of a lord chancellor, Davidson thought the present lord chancellor should be called in to decide to what extent the law officers might be putting expediency above legality. But Anderson thought the report took a "practical point of view . . . essential to good government." And the foreign secretary, Kimberley, silenced any suggestion of a further reference: "I do not see why we are not to accept law officer opinion which seems in accord with commonsense, and [I am] glad those conversant with the law agree."

Bramston had achieved another important breakthrough in theory. The concession won in the Gold Coast case of 1895 was followed up partially in East Africa in 1897 and then fully in 1899.<sup>83</sup> The East Africa Order in Council of 1897 was applied to natives in specified cases, mainly in connection with the use of native courts. Two years later the order was extended by applying all the queen's regulations to natives. A native was defined as a person not a British subject or of European or American race or parentage (although certain natives within the domain of the Sultan of Zanzibar on the East African mainland were not included).

By 1895, mainly through the efforts of Bramston, British theory

81. Minute, Wingfield, February 19, 1895, C.O. 96/263/2865.

82. Minutes, Davidson, February 27, 1895, Anderson, February 27, 1895, Kimberley, February 28, 1895, F.O. 83/1375.

83. This is discussed more fully within.

(and practice) on jurisdiction in protectorates had been brought almost akin to that of German and French protectorates. This approach was highly desirable from the point of view of the Colonial and Foreign Offices since it allowed a more effective jurisdiction and consequently a more effective administration. The root of the trouble for British administrators at the beginning of the 1890s had been the British legal theory on sovereignty and although this still remained it had been whittled down and pared away at the edges. Through the manipulation of the system of legal advice the administrators in the Colonial Office and the Foreign Office had been able to obtain legal approval to easy devices whereby the consent of foreigners was assumed to the exercise of British jurisdiction and whereby natives were taken to have given up jurisdiction to British authorities. The issue of sovereignty was sidestepped; the cause of protection was opened up and advanced. A jurisdictional empire was possible, and without great military or financial involvement. The need to provide peace, order, and good government for Britishers, foreigners, and natives could find implementation through the system of jurisdictional imperialism.

## The Widening Scope of Protection

The legal decision of 1895 concerning the Gold Coast had ramifications wider than the point at issue—jurisdiction over natives in a protectorate. In particular the admission of jurisdiction over natives opened up the whole question of the nature of a protectorate. The problem of jurisdiction in courts led directly to the question of control over natives generally, the power of the protecting state to make regulations and rules affecting them, in short the exercise of legislative and administrative powers over all inhabitants in the protectorate.

The power to make regulations affecting a protectorate, like the right to exercise jurisdiction, developed slowly over the years, becoming more definitely established as British interests became more directly involved in a growing number of protectorates. By 1895 the Colonial Office was prepared to instruct a colonial governor that British protection of an uncivilized country involved the exercise of authority and jurisdiction almost akin to sovereignty.<sup>1</sup> So the governor of Sierra Leone was informed that the local legislature was empowered by Order in Council to make laws for the adjoining areas under British "protection" although a protectorate had never been formally proclaimed. The principle underlying these instructions was drawn directly from the formulation devised by Bramston earlier that year for the Gold Coast.

In settling these instructions discussions had taken place between the acting governor of the colony and the Colonial Office as to what steps could be taken to administer and provide for justice in the territories adjacent to Sierra Leone.<sup>2</sup> The governor

1. Chamberlain to Cardew, October 16, 1895, C.O. 879/49.

2. Cardew to Ripon, confidential, June 16, 1894, C.O. 879/49.

avored the declaration of a protectorate, to be followed by the suppression of the slave traffic by the Frontier Police Force. Then, gradually, the country could be brought under a settled scheme of administration.

The answer of Lord Ripon was to issue an Order in Council under the Foreign Jurisdiction Act of 1890 entrusting to the colonial legislature full protectorate jurisdiction over the territories adjacent; this included the power to issue regulations affecting all persons therein.<sup>3</sup> And the courts of the colony were authorized to exercise jurisdiction in the nearby "protectorate."<sup>4</sup> This action brought Sierra Leone into line with the other colonies along the west coast of Africa—the Gold Coast, Lagos, and the Gambia—that had adjoining "protectorates" to the hinterland of the colony. No formal protectorate, as such, had been proclaimed.

Two channels existed whereby this legislative power (to make rules and regulations for a protectorate) could be exercised. As indicated above the power could be entrusted to a colonial legislative structure. This was suitable in those cases, as in West Africa, where a small colony skirted the coast and immediately adjacent lived tribes who, through the sheer factors of time and geographical proximity, were increasingly coming under British influence and "protection." The first significant legal move by British authorities in respect of this type of situation had been the issue in 1874 of the Gold Coast Order in Council.<sup>5</sup> This empowered the Legislative Council of the Gold Coast to regulate by ordinance the exercise of powers and jurisdiction acquired by Her Majesty in adjacent territories; (the powers and jurisdiction were not defined). This action could be justified on the ground that the native rulers and people of those territories had by tacit acquiescence, sufferance, or usage allowed themselves to become subject to British regulations. Similar powers were extended to Lagos in 1887 and the Gambia in 1893 and this was the model of the Sierra Leone Order in Council of 1895.

The second approach arose out of the regular system of exter-

3. Ripon to Cardew, confidential, September 12, 1894, C.O. 879/49.

4. Order in Council, August 24, 1895.

5. Gold Coast Order in Council, August 6, 1874, above.

ritorial jurisdiction devised for Moslem or oriental countries.<sup>6</sup> A useful model was the Order in Council of 1856 issued under the Foreign Jurisdiction Act for the exercise of British jurisdiction in the kingdom of Siam.<sup>7</sup> Under that order the consul was afforded the power to make rules and regulations for the observance of stipulations of treaties granting jurisdiction and for the peace, order, and good government of British subjects in Siam. Breach of these rules and regulations could be met by fines or imprisonment. Such a formula became standard for all Orders in Council regulating foreign jurisdiction but it should be noted that the operation of the clause was restricted to British subjects.

During the 1880s this second method became more developed and explicit in its application to protectorates. The West Africa Order in Council of 1885 authorized the consul to make Queen's Regulations under three heads:<sup>8</sup>

1. to secure the observance of treaties affecting the protectorate
2. for the peace, order, and good government of British subjects
3. for requiring returns of exports and imports. . . .

But this specification of functions did not materially increase the consul's power to make regulations or administer the area as expressed in the general formula of the earlier style of order.

Further elaborations of this basic formula were made in subsequent orders. The Africa Order in Council of 1889 followed that approach and added two further points—that regulations could be made to secure due observance of native law and custom; and the consul could regulate the governance, visitation, care, and superintendence of prisons.<sup>9</sup> The Pacific Order in Council of 1893 added specific duties to the "peace, order and good government" clause; the commissioner could make regulations for the peace, order, and good government of persons subject to the

6. For general background on extritorial legislative and regulation-making power, see Charles James Tarring, *British Consular Jurisdiction in the East*, pp. 73–74; Francis Taylor, *Exterritoriality; the Law Relating to Consular Jurisdiction and to Residence in Oriental Countries* (London: William Clowes and Sons, Limited, 1892), pp. 111, 118–19; Claire Palley, *The Constitutional History of Southern Rhodesia*, pp. 52–53.

7. Siam Order in Council, July 28, 1856, art. 1.

8. West Africa Order in Council, March 26, 1885, art. 8.

9. Africa Order in Council, October 15, 1889, art. 99.



jurisdiction of the court, including the prohibition and punishment of acts "tending to disturb the peace between native chiefs, tribes or populations."<sup>10</sup>

These encroachments, taking greater legislative powers for British officials, were subtle and restrained and were directed primarily at British subjects. But Bramston's memorandum of 1891, and the Order in Council he drafted in pursuance thereof, was direct and forthright in its claims of legislative power. Consistent with his intention of affording British officials as complete a power as was necessary Bramston provided the high commissioner with the power to issue proclamations for the administration of justice, the raising of revenue, and generally for the peace, order, and good government of all persons within the limits of the order.<sup>11</sup> At the same time, the high commissioner was enjoined to respect native laws and customs as much as possible.

The 1891 order left vague whether or not the order or regulations drawn under it applied to natives of the protectorate. But the trend was towards the extended assumption of power and this point was clarified in 1895 in the instructions sent by the Colonial Office to the governors of the Gold Coast and Sierra Leone. After that date the practice developed of defining in greater detail the legislative powers of the British protecting authority.

When drafting the East Africa Order in Council of 1897 Gray was impressed by the advantages that had accrued to British authorities through the development of legislative powers as provided in the various African Orders in Council, especially in so far as these powers helped to overcome problems of administration in areas such as the Niger and British Central Africa protectorates.<sup>12</sup> Accordingly, to give greater assistance to the commissioner of the East Africa Protectorate in the exercise of his increasing powers and responsibilities in the protectorate, Gray itemized the administrative purposes for which regulations might

10. Pacific Order in Council, March 15, 1893, art. 108. Most orders included a regulation power concerning the registration of British subjects.

11. South Africa Order in Council, May 9, 1891, art. 4.

12. Memorandum on East Africa Order in Council, Gray, *ca.* January 5, 1897, F.O. 2/142.

be made—for customs, inland revenue, post office, land, highways, railways, money, agriculture and public health; for establishing a constabulary to ensure order and defence (both internal and external); and for securing the observance of treaties affecting the protectorate and of native law.<sup>13</sup> At the same time, it was not intended to limit the general powers of the commissioner to legislate for the peace, order, and good government of the protectorate.

This increasing British interference in the affairs of a protectorate was given full legal sanction in the East Africa Order in Council of 1899. On that occasion the Foreign Office requested the law officers to approve an explicit provision that all Queen's Regulations extended to natives.<sup>14</sup> The law officers approved without comment, and the order issued accordingly that the queen had the right to legislate for natives through her regulations.<sup>15</sup>

Through the 1890s a discernible pattern was appearing as to British policy and legal theory concerning control of protectorates. The solution of a particular problem in one protectorate was soon applied to other protectorates. Jurisdictional problems arose first in South Africa in 1891; the solution worked out there was later applied to West Africa, East Africa, and the Pacific. The immediate need had been control over foreigners; but this led to the need to assert control over natives and to the general right to legislate for a protectorate. Slowly legal theory evolved—to allow British authorities a free hand to solve protectorate problems, to use as much authority as was necessary to make the protection effective. In this way Britain came to claim almost sovereign powers over a protectorate and at the same time had legal justification to do so.

As further evidence of the extent of control that British authorities assumed in protectorates one might notice the solutions adopted in the East Africa Protectorate in 1897 and 1899 for two

13. East Africa Order in Council, July 7, 1897, art. 45.

14. Salisbury to Webster, Finlay, July 24, 1899, F.O. 2/549.

15. Webster, Finlay to Salisbury, August 8, 1899, F.O. 2/549; East Africa Order in Council, October 7, 1899, art. 9.

problems—one involving the functioning of native courts, the other the ownership of land.

In the former case, Gray, the draftsman, was responsible for an innovation designed to overcome the lack of effective native justice in the protectorate. Owing to a dearth of recognized native tribunals in the inland areas Gray recommended that justice for natives should be administered by protectorate officials.<sup>16</sup> Appropriate native courts were to be constructed, administering native law and custom for civil matters and Indian penal law for criminal matters; the courts were to be subject to official British supervision. Hardinge, the British consul-general at Zanzibar and commissioner for East Africa, supplied the details to implement Gray's suggestion.<sup>17</sup> For instance, native *walis* and *cadis* (learned Moslems) were to assist in certain cases in carrying out the bulk of the basic judicial functions. Gray approved Hardinge's plans for the execution and spread of British justice.

The scheme proposed by Hardinge for the administration of justice to natives in the British East Africa protectorate appears to be well devised and to give good hope of successful working.

The most important part of the scheme is the share to be assigned in judicial matters to the *walis*. He appears to be satisfied that the men on whom he proposes to confer very considerable powers are loyal and intellectually competent. If so, their cooperation is likely to do much towards producing a class of trained native administrators, besides diffusing among the native population a knowledge of and respect for British law.

The effect of these plans prepared by Gray and Hardinge was that, apart from providing a protectorate court for cases between British subjects, foreigners, and in certain cases, natives, the British government had taken upon itself the task of reorganizing the native courts and even of creating them where they did not

16. Notes of draft East Africa Order in Council, Gray, March 1896, F.O. 2/142; for background see G. H. Mungeam, *British Rule in Kenya, 1895-1912* (Oxford: Clarendon Press, 1966), pp. 55-59; "Report by Sir A. Hardinge on the Condition and Progress of the East Africa Protectorate from its Establishment to the 20th July 1897," [C. 8683], pp. 33-37, P.P. 1898, LX.

17. See Gray to Salisbury, July 3, 1896, F.O. 2/142.

exist but might be needed. But to counter any possible objection that such administration of justice to natives was capricious or lacking in authority or responsibility Gray made the reorganization of the system of native justice subject to the sanction of the foreign secretary.<sup>18</sup> And when the law officers were asked their opinion on this intrusion into native affairs through the control of native courts they answered simply: "We entirely approve. . . ." <sup>19</sup> Clearly the lawyers accepted the principle that the necessities of "protection" determined the extent of British authority to be exercised in this matter.

The scope of these native courts was extended in the East Africa Order in Council of 1899.<sup>20</sup> Hardinge had run into difficulties in administering the 1897 provisions since it applied only to natives of the East Africa Protectorate. So, the courts could not handle cases involving Muscats, Arabs, natives from Uganda protectorate, and natives from adjoining protectorates belonging to Germany and Italy.<sup>21</sup> The effect of this was that a native of the East Africa Protectorate would have his case tried in a native court by a procedure suited to him while a native from just across the border in Uganda, perhaps of the same tribe, would have his case tried according to the formalities of the East Africa Order in Council. Consequently, Gray prepared a revised order to allow the native courts to operate more effectively and comprehensively.<sup>22</sup> In the future, the natives of all protectorates in Africa and Arabia were put in the same position as the natives of the East Africa Protectorate and made subject to the native courts.

Again the British authorities, both on the spot and in Whitehall, had acted in full control of the situation, accepting no restraints upon their powers to administer the protectorate. Even the preservation and perpetuation of native institutions and systems became subject to British supervision and alteration. Since

18. Memorandum on East Africa Order in Council, Gray, *ca.* January 5, 1897, F.O. 2/142.

19. Webster, Finlay to Salisbury, April 13, 1897, F.O. 2/142.

20. Notice the redefinition of "native" in Article 2, East Africa Order in Council, 1899.

21. Hardinge to Salisbury, August 18, 1897, F.O. 2/142.

22. Gray to Salisbury, November 26, 1897, F.O. 2/142; Gray to Salisbury, August 8, 1898, F.O. 2/549.



not all the natives were ready to receive British law, the existing system had to be revised and made more fully operative. So the native courts were reorganized under British supervision and their jurisdiction was increased for reasons of British administrative convenience. To the British administrator the guiding principle was administrative efficiency—the protection must be made effective. And legal theory condoned this approach.

A similar attitude was displayed by the British in the question of the ownership of land in the East Africa Protectorate. The issue came to a head over the laying of the Uganda railway but its origin lay in the acquisition by the crown in 1895 of the rights of the Imperial British East Africa Company.<sup>23</sup> Obviously any land that the company had owned could be freely dealt with by the crown. But what of the waste lands, the unoccupied lands of the protectorate? In a crown colony the crown automatically assumed control of such lands. And for administrators and settlers a similar position was desirable in protectorates. If the crown could deal with uncultivated and unoccupied lands without the assent of the natives and, in particular, if it could grant freehold title to land any possible problem about title to protectorate land could be easily solved and settlement allowed.

The Foreign Office, which administered the protectorate, called in the Colonial Office to help settle its Land and Mining Regulations for East Africa.<sup>24</sup> The latter office had had considerable experience in this matter; recently it had been involved in settling various land and mining regulations for the Straits Settlements, the Gambia, Zululand, and areas under the British South Africa Company. Furthermore, at the time when the Foreign Office request arrived, there happened to be in London two colonial administrators, both of whom had been concerned with land problems in the colonies. Sir William Maxwell, governor of the Gold Coast, had trained as a lawyer and in 1882 had been ap-

23. For a review of land policy in Kenya, see M. P. K. Sorrenson, "Kenya Land Policy," *History of East Africa*, ed. Vincent Harlow, E. M. Chilver and Alison Smith (Oxford: Clarendon Press, 1965), II, 672–76; M. P. K. Sorrenson, *Origins of European Settlement in Kenya* (Nairobi: Oxford University Press, 1968), chap. iii.

24. Salisbury to Chamberlain, June 30, 1896, C.O. 417/191/13831.



pointed to investigate the operation of the Torrens system of land registration in Australia.<sup>25</sup> Sir George Bower was secretary to the high commissioner for South Africa and had a working knowledge of the land and mining system in operation in that area.

Bower's attitude was that the Foreign Office had no authority to assume any right at all to grant land.<sup>26</sup> Referring to his South African experience he pointed out that a protectorate did not create the right to deal with waste lands and certainly crown ownership could not be said to arise simply by the fact of the establishment of a protectorate. In a case like that of the British South Africa Company where it held a concession of land and mining rights from the chief (the late Lobengula) the land could be freely disposed of but not otherwise.

Maxwell followed up Bower's point with the suggestion that the only way to overcome the crown's lack of power to deal with such lands was to issue an Order in Council.<sup>27</sup> Possibly the necessary authority could be found in the general power of the high commissioner to provide for the "peace, order, and good government" of the inhabitants—the words normally used in jurisdictional orders. But it was doubtful that such a provision could cover the situation of land ownership and transfer since the high commissioner was also bound to respect native laws and customs.

The Colonial Office recommended to the Foreign Office the adoption of its system operating in the Gambia—a system of land certificates rather than grants in fee or leases.<sup>28</sup> Such certificates had different effects depending upon whether the crown lands were within a colony or within a protectorate. In the former case the certificate amounted to a license to occupy the land, being crown land, upon certain conditions. In protectorate lands

25. Sir William Edward Maxwell, 1846–97, qualified at the Penang and Singapore bars and later (1881) was admitted to the Inner Temple. In 1892, he was colonial secretary of the Straits Settlements; between 1893 and 1895, he was acting governor, and in the latter year he was appointed governor of the Gold Coast (*D.N.B. Supplement*).

26. Memorandum, Bower, *ca.* July 15, 1896, in Chamberlain to Salisbury, September 4, 1896, F.O. 2/176.

27. Maxwell to Chamberlain, July 21, 1896, in Chamberlain to Salisbury, September 4, 1896, F.O. 2/176.

28. Minutes, Bramston, August 9 and 29, 1896, Chamberlain to Salisbury, September 4, 1896, C.O. 417/202/1534.

it was an authority from the protecting power to occupy an area of waste land which had no owner; and as between the government and the occupier it would form a contract enforceable in the courts.<sup>29</sup> The grant of occupation was an administrative act and not a transfer of title. Therefore the crown could grant occupation to someone and protect him against interference.

At the same time there were counter views held by members of the Colonial Office on the power of the crown over protectorate lands. Charles Lucas, an assistant under-secretary, argued that in the case of East Africa concepts of ownership and occupation were not very well developed;<sup>30</sup> that waste land was no-man's-land and so it belonged to the strongest occupant. This would allow the British government to step in and do whatever it chose with the land: "therefore it [land] belongs to the strongest occupant for the time being, and the British government *quâ* protector of what belongs to nobody and as having the strength to do so, is right in granting titles." Fairfield raised the basic question as to whether one could any longer assert that a protectorate had an independent existence.<sup>31</sup> He attacked official theory to the extent that it was based upon the concept that Britain held only partial sovereignty in a protectorate. Apart from the changes that the Colonial Office had been working out since 1891 he produced as supporting evidence the summing up of Lord Russell in the recent *Jameson* case.<sup>32</sup> So far as Fairfield was concerned:

Lord Russell in the whirlwind of his rhetoric almost raised to the ground the distinction between British territories and British protectorates, and I think that of all places on earth British East Africa is the last place where we should insist on that distinction.

29. Note that Davidson considered in 1899 that Colonial Office practice tended towards treating both classes in West Africa as being the same, F.O. 2/259; see "Memorandum of Lands in Parts of the West African Colonies and Protectorates Particularly in the Gold Coast," in Chamberlain to Salisbury, April 7, 1899, C.O. 417/251/25287, within.

30. Minute, Lucas, July 30, 1896, C.O. 417/202/15348; the Foreign Office adopted this line in 1899, Salisbury to Webster, Finlay, November 18, 1899, F.O. 2/241.

31. Minute, Fairfield, August 28, 1896, C.O. 417/202/15348.

32. *Regina v. Jameson and Others*, [1896] 2 Queen's Bench, 425, especially pp. 430-31. Charles Russell (Lord Russell of Killowen), lord chief justice, was a former attorney-general, 1886 and 1892-94, before his elevation to the Bench.

This case concerned the military preparations made in the Bechuanaland protectorate by Jameson for his raid into Transvaal in 1895. The judge took it as accepted that for the purposes of the case and under the terms of the relevant statute the preparations took place within Her Majesty's dominions. But Fairfield was, in fact, misinterpreting the import of the judge's words, which were restricted to one particular situation—that for the purposes of the specific legislation, the Foreign Enlistment Act, the protectorate concerned was part of Her Majesty's dominions.

Lord Selborne, the parliamentary under-secretary, also voiced his disapproval of the legal distinction between colonial and protectorate lands. He urged a deemphasis on old doctrines, hoping to avoid "too much insistence on our old doctrines. Apart from legal interpretations it looks to me as if the protectorate as an administrative garment was wearing out."<sup>33</sup> But for the time being the legal difficulties remained and so the Foreign Office found itself obliged to settle upon cautious regulations following the Colonial Office advice to issue certificates of occupation and to avoid any grant in the nature of freehold.<sup>34</sup>

The 1897 Land Regulations were intended to settle the general question of crown rights over protectorate land. But almost immediately the question was raised again with the laying of the Uganda railway from Mombasa.<sup>35</sup> It was necessary to appropriate land for the line itself and the Treasury requested that some of the cost of construction should be recouped by the acquisition by the crown of a zone one mile wide on both sides of the line.<sup>36</sup> The Uganda Railway Committee concluded that they should disregard legal considerations about land title and instruct Hardinge to issue a proclamation appropriating the land.<sup>37</sup> The members were approaching the problem from a practical point of view—if they appropriated the land, who was there who could turn them out? No one else had a better title. The commissioner of the East Africa Protectorate proceeded to carry out those in-

33. Minute, Selborne, August 31, 1896, C.O. 417/202/15348.

34. Land Regulations for East Africa Protectorate, December 29, 1897.

35. G. H. Mungeam, *British Rule*, pp. 33ff.; Sorrenson, *Origins*, pp. 25-26.

36. Treasury to Salisbury, March 24, 1897, F.O. 2/135.

37. See minute, Bertie, April 15, 1897, F.O. 2/135.

structions.<sup>38</sup> He sought authority for his action in Article 11 of the East Africa Order in Council of 1897 wherein provision was made for the application of the Indian Land Acquisition Act to the protectorate. That act (and the later East Africa (Acquisition of Lands) Order in Council of 1898) vested land acquired for the railway in the commissioner and empowered him to dispose of it, by sale or lease. In this way a limited break in old doctrines was achieved, at least where land was appropriated for public purposes such as railways.

Meanwhile there was a growing volume of criticism of the recent Land Regulations issued for East Africa (and also of similar Regulations for Uganda), especially with regard to private land ownership. Settlers were becoming more vocal in their demands for freehold title and freedom of alienation.<sup>39</sup> The Foreign Office seemed pliable but the Colonial Office still held its reservations about the extension to the crown of the right to deal with such waste and unoccupied land.<sup>40</sup> This had not happened in South Africa and there seemed no reason why it should happen in East Africa. At the same time a more fluid situation had been developing in West Africa. There the use of formal land regulations was avoided so that the colonial government was left with a wide discretionary power of action. Purchases were ratified on the merits of each case and conditions imposed accordingly. But these arrangements had been used principally for privately owned land and so it was doubtful that the system could be applied generally to waste and unoccupied lands. Consequently the Colonial Office again reminded the Foreign Office of the limited freedom of the crown to deal with waste lands.<sup>41</sup>

The Foreign Office found itself thwarted by this advice. Lord Salisbury, condemning the inconvenience of the existing system, decided a reference should be made to the law officers asking for

38. Between May and July 1897, the commissioner issued a notification as to appropriation, a notice of compulsory purchase, and a notification of transfer of land.

39. Salisbury to Chamberlain, September 26, 1898, C.O. 417/251/21775, November 10, 1898, C.O. 417/251/25287.

40. Minutes, Perry, December 9 and 19, 1898, Cox, December 21, 1898, C.O. 417/251/25287.

41. Chamberlain to Salisbury, January 25, 1899, F.O. 2/259.



a definite statement of the legal position.<sup>42</sup> Since railway land was already being acquired under the Indian Act he hoped a redefinition of the law might be obtained in the case of waste lands.

A case was carefully prepared with two basic arguments.<sup>43</sup> Firstly it was argued that there was a significant difference between a protectorate like Zanzibar and the one in East Africa. In the former there existed a developed administrative, legislative, and judicial system under the control of the protected power; it had a body of law relating to land tenure and transfer. In the latter there were a number of petty chiefs, practically savages:

[they] exercise a precarious rule over tribes which have not as yet developed either an administrative or a legislative system; even the idea of tribal ownership of land is unknown, except in so far as certain tribes usually live in a particular region and resist the intrusion of weaker tribes, especially if the intruders belong to another race.

Furthermore, it was argued that land was occupied to grow crops and run cattle but it seemed that the land had no intrinsic value in its own right; it was the crops and the cattle to which the natives attached value. There was certainly nothing that seemed to approach the sacredness that ownership of land held in English law.

This argument overlooked many problems, mainly because the British had a very imperfect and inexact understanding of the system of land tenure that applied in these East African areas. This was not very surprising. The matter had hardly been looked into, except through inexperienced eyes, and in any case, there was a variety of systems to add confusion to British attempts to establish uniformity. Contemporary observers, applying standard English concepts of land ownership, might well believe that the natives did not own land and that East African lands were open for white acquisition. Lugard observed:

Such personal acquisition of land is unknown among the savage tribes of Africa, where the tenure of land is merely tribal. In Uganda the

42. Minutes, Salisbury, *ca.* November 18, 1899, F.O. 2/241.

43. Salisbury to Webster, Finlay, November 18, 1899, F.O. 2/241.



individual does acquire land, and cultivate it for his own use and profit, and this is one of the most noteworthy indications of the progress those people have made in civilization. Yet even here the tenure is uncertain. In the case of the chiefs it is held simultaneously with the office, which is revocable, according to old Uganda usage by the king. . . .<sup>44</sup>

He was convinced that Africans had no conception of the significance of title to land.

Even today the customary system of tenure is not fully and clearly settled. As a general statement it seems true that ownership of land was not an important factor in African thinking. At the same time, the occupation and use of land was. So various rights, amounting almost to ownership in some cases, did exist and these rights might be variously held by individuals, by groups or communities, or by kings or chiefs as trustees or in their own right.<sup>45</sup> For example, in the kingdom of Buganda the system prior to British intervention depended upon the authority of the Kabaka.<sup>46</sup> He had full authority to distribute rights over the land, with duties such as the collection of tribute and taxes. Ownership of the land, however, was not a matter of special significance; what mattered was jurisdiction over the persons occupying the land. The Kabaka and his chiefs were concerned with the produce and the profits of the land, with contractual and jurisdictional relationships, not with ownership as such. In fact, "ownership" in an inexact sense rested with the Bantu clans in occupation and this use of the land was left undisturbed.

In Kenya, too, the general position was that ownership of land had no special value; certainly it had no marketable value since land was plentiful. There was no need for individual proprietorship of land; a group occupied a piece of land and each member

44. Frederick J. D. Lugard, *The Rise of Our East African Empire* (Edinburgh: Blackwood, 1892), II, 645; Harry Johnston made similar comments in *The Uganda Protectorate* (London: Hutchinson, 1904), I, 299.

45. H. W. J. Sonius, *Introduction to Aspects of Customary Land Law in Africa as Compared with Some Indonesian Aspects* (Leiden: Universitaire Pers Leiden, 1963), pp. 18, 24, 35-38.

46. D. A. Low and R. C. Pratt, *Buganda and British Overrule, 1900-1955* (London: Oxford University Press, 1960), pp. 49-51, 127, 195; E. S. Haydon, *Law and Justice in Buganda* (London: Butterworth, 1960), pp. 127-28; Douglas Brown and P. A. P. J. Allen, *An Introduction to the Law of Uganda* (London: Sweet & Maxwell, 1968), pp. 76-78.

of the group could cultivate enough land for his sustenance. In the case of the Kikuyu, however, land took on a special meaning, much more so than was the norm among East African groups.<sup>47</sup> A plot of land was owned jointly by the members of a small lineage group; the head held it in trust for the group and its descendants. Ownership of land was never transferred, even though it might be loaned to individuals outside the group. When the land became overtaxed to support an expanding group some would move elsewhere and take over virgin land, or if the land became exhausted the whole group would move. So they needed waste land for future occupation. The important point to consider in Kikuyu thinking was that land had a deep emotional significance. The Kikuyu identified with his land and did not want to be landless. In this sense the Kikuyu had an appreciation of land as highly developed, if not more so, than the prevalent nineteenth century English philosophy on the sacredness of property; nevertheless, the Kikuyu did not express it in a legal system of ownership familiar to European minds.

These variations and complexities in the system of land tenure in East Africa were not seriously investigated by British administrators. Indeed, if they had paid much attention to these problems, they would have become further troubled by the question as to who, if anyone, was legally entitled to transfer title to land. As it was, their main concern was not to obtain a wholesale transfer of all land from the natives; rather it was to obtain control over only some land so as to help defray the costs of administration. And this seemed to be most easily attainable through the assumption of control over the waste or unoccupied lands. Needless to say they used their own standards as to what were waste or unoccupied lands. So far as the rest of the land was concerned the administrators hoped a uniform system could be worked out wherein either the chiefs or the occupiers obtained a freehold title.

47. Sorrenson, *Origins*, pp. 51-52, 178ff.; P. J. N. Mugerwa, "Land Tenure in East Africa—Some Contrasts," *East African Law Today* (British Institute of International and Comparative Law, Commonwealth Law Series, No. 5; London: Stevens, 1966), pp. 102-04.

As a second approach the Foreign Office argued on the more general framework of the nature of a protectorate. It was pointed out to the law officers that through Colonial Office initiative recent important changes had come over the juridical concept of a protectorate. Reference was made to the Gold Coast decision of 1895 and to the recent East Africa Order in Council of 1899 which had adopted the principle of that earlier decision, that all persons, including natives, came under British jurisdiction and regulations applied to everyone. Furthermore, it was pointed out that in British Central Africa the power of the chiefs was declining so that few exercised judicial, legislative, or administrative functions; the lack of authority had been met practically by allowing the British officers of the protectorate to exercise these functions on the assumption that they acted on behalf of the chief. And in practice this pattern seemed as though it would have to be repeated in East Africa. The suggestion was politely but firmly made that the law should catch up with practice in such matters as the control of land.

The plea made by the Foreign Office questioned directly the nature of a protectorate. It was a plea for legal approval of effective government control to help the development and progress of British protectorates.

It seems, therefore, proper to consider whether, in such a region as East Africa, in order that the Protectorate may produce its due effect in regard to the good government and the development of the country, the Protecting Power should not assume jurisdiction over waste and uncultivated land in places where the native Ruler is incompetent, whether from ignorance or otherwise, to exercise that jurisdiction.

The law officers were impressed and answered affirmatively.<sup>48</sup> They agreed that in areas like East Africa which were occupied by savage tribes with little conception of ownership the right to deal with the waste and unoccupied lands accrued to Her Majesty by virtue of Her right to the protectorate. "Protectorates, such as those now under consideration, really involve the assumption of control over all lands unappropriated." So the

48. Webster, Finlay to Salisbury, December 13, 1899, F.O. 2/259.

crown could declare them to be crown lands and make grants in fee or for any term. The lawyers then went on to condone all the steps taken by British officials in land matters in East Africa—the Indian Land Acquisition Act, the various land regulations, the East Africa Orders in Council—thereby setting at rest doubts about the validity of some of those actions taken since 1897 to effect the laying of the railway line.<sup>49</sup>

For the East Africa Protectorate the reinterpretation of the legal theory on land was important in that it heralded the quickening of European settlement. The administration could entice immigrants with grants of freehold land. But the decision also had a wider significance so far as imperial administration of protectorates was concerned. This decision was in line with the two other decisions of the 1890s—for South Africa in 1891 and for the Gold Coast in 1895—in bringing about a revolution in the theory of British protectorates. Practical circumstances in the field made necessary this revolution; otherwise the law would have been seriously out of phase with policy aims and practice. It was fortunate for the administrators in Whitehall that the law on protectorates was not fully settled at that time and in the previous two decades had been the subject of considerable argument. So the task of inducing the legal advisers to approve developments and refinements in theory was made easier.

In the late 1890s the main focus of attention with respect to developments in extraterritorial jurisdiction moved from problems in southern Africa, West Africa, and the Pacific to the question of the exercise of jurisdiction in East Africa. This area was the slowest to be opened up and when European penetration did commence it was the British Foreign Office, not the Colonial Office, that found itself saddled with the job of making effective jurisdictional arrangements for the area. The staff of the Colonial Office throughout the 1890s had shown themselves quite determined to effect changes in the theory so as to facilitate and streamline their administrative responsibilities. It was not until

49. This problem was completed by the issue of the East Africa (Lands) Order in Council of 1901; no further new, basic principles were introduced in the order.



1899, in the land issue, that the Foreign Office finally caught up fully with the changes being wrought by the Colonial Office and began to apply its own initiative to secure further legal concessions.

Starting from the Colonial Office example the Foreign Office went further and set in train the process of converting a protectorate almost into a colony. The Colonial Office since the 1840s in the case of the Gold Coast had been prepared to undertake certain administrative and legislative tasks in relation to a protectorate along with the regular duties that one would expect in a foreign jurisdiction area. But the extension of this approach had been very slow and limited; for a period it had been definitely halted. Then, in the 1890s, the Colonial Office again began to interfere in administrative and legislative arrangements in protected areas. By the end of the 1890s, in the case of the East Africa Protectorate, the matter was carried further than ever before. The Foreign Office authorized interference in the traditional native systems of land-holding and of justice. That department was ready to take over waste land (as defined by itself) and to supervise the administration of native judicial arrangements. In other words the British government adopted a policy of allowing interference on a wide scale in protectorate affairs. The protectorate no longer had its original limited sense relating to British protection in matters of that territory's foreign affairs. Now the British government was prepared to interfere freely in internal affairs, not only for the protection of British subjects or of foreigners, but also for the regulation of the life of the native inhabitants. Obviously this was a direct move towards allowing the full introduction of the British system. It seemed to indicate that in the future a British protectorate could be made as like as possible to an area of British settlement and in time all the trappings of British civilization would be introduced. Native ideas and institutions might survive, for a while and in some respect, but generally they would be used as interim agencies to assist in the transition-process whereby a savage, primitive community would become a civilized British society.

From the point of view of the law officers the changes that



they approved during the 1890s could be explained away because of the uncertainty of the law. Furthermore they were able on occasions to take refuge behind the statement that often policy considerations were more pertinent to the problem than the law was. The lawyers sought to deny that their decisions were over-riding previous statements of the law and argued for the continuity of legal developments. Their protestations are understandable but this does not alter the fact that the decisions of the 1890s took a different turn and added new dimensions to the law that the lawyers of the 1880s had not been able or had not chosen to take. Legal theory in the earlier decade forced protectorates to be turned into annexations; legal theory in the next decade approved effective British administration in protectorates, without the necessity of annexation.

## A Paper Empire Made by Lawyers

The content of the terms “foreign jurisdiction” and “protection” varied considerably between the middle and the end of the nineteenth century and at a superficial glance the variation seems whimsical and arbitrary. At a closer look at the sources of legal advice during this period the reasons for the variation become more apparent. These sources were neither centralized, nor consistent; sometimes they were not even coherent. Prime Minister Salisbury, anxious about a Boer War legal problem, observed that the legal guidance of Great Britain rested on three supports: unfortunately, he lamented, two of them were indisposed in this time of crisis.<sup>1</sup> The three sources where legal theory was retained or could be formulated were in the first place the legal advisers residing permanently within a government department and secondly two external sources, the law officers of the crown and the lord chancellor. Salisbury overlooked a further miscellaneous group of legal advisers, the chief of whom were the parliamentary draftsman and parliamentary counsel.

The first source, in its broadest sense, included any officer of the department (the Colonial Office or the Foreign Office) who had a legal training. But in both offices there usually were one or two members who, at least unofficially, and sometimes officially, were the “legal advisers” of the department. Of all the sources of legal theory these members proved to be the most important. Perhaps this was because the nature of their duties required them to be simultaneously practical administrators and sound lawyers. Hence it was their task to combine legal theory with practical expediency.

1. Salisbury to Harcourt, January 7, 1900, private, Halsbury MSS, Box 4/29.

In the early 1870s the system whereby the legal business of the government was handled came under criticism. James Bryce,<sup>2</sup> himself a lawyer and academic, denounced the existing system in strong terms.<sup>3</sup> He complained that legal advice came from a variety of scattered sources and was subject to no central control. Some departments had their own office of legal adviser—in the Colonial Office, the India Office, the Home Office—and they were useful in handling minor legal business. Bryce wanted those offices centralized under one authority, a separate legal department. Late in 1873, Sir William Harcourt, an eminent international lawyer, at that time solicitor-general for the Liberal administration, condemned the Foreign Office for its “thoroughly inefficient way” of doing legal business; he denounced its “scamped work.”<sup>4</sup>

It was not until 1875 that Sir Stafford Northcote, chancellor of the Exchequer, took notice of the growing criticisms and appointed a commission to consider in a general way the problem of the government’s legal business.<sup>5</sup> One of the terms of reference included an examination into the sufficiency or redundancy of the various solicitors’ departments attached to different public offices. Out of this arose a consideration of the effectiveness of the system for providing legal advice within the Colonial Office and the Foreign Office.<sup>6</sup>

In giving evidence to the committee, Sir John B. Karslake,<sup>7</sup> a former attorney-general, spoke highly of the system operating in the Colonial Office.<sup>8</sup> There, he said, papers composing a refer-

2. Bryce, see Appendix.

3. James Bryce, “The Organization of a Legal Department of Government,” *Fortnightly Review*, XIII (N.S.) (1873), 316–18.

4. Harcourt to Lister, December 16, 1873, private and confidential, Harcourt MSS.

5. Northcote to Jessel, February 24, 1875, Iddesleigh MSS, B. M. Add. MSS 50052, f. 201.

6. Treasury Minute, March 14, 1875, “Reports of the Committee Appointed to Inquire into the System upon which the Legal Business of the Government is Conducted,” H. of C. No. 199, p. 51, *P.P.* 1877, XXVII. The committee of five was headed by Sir George Jessel, master of the rolls and a former solicitor-general, and included Henry T. Holland, who had been appointed legal adviser to the Colonial Office in 1867.

7. Karslake, see Appendix.

8. Karslake, June 10, 1875, H. of C. No. 199, p. 45, *P.P.* 1877, XXVII.

ence to the law officers were presented clearly and logically so that it was easy to discover what the legal problem was; this was attributed to the presence of a permanent legal officer within the department. The Foreign Office, on the other hand, failed to organize its papers. Accordingly, he recommended the appointment of a permanent lawyer to that office.

The committee was impressed by this and by other evidence of a similar nature and in its third report it recommended that the Foreign Office should have a permanent legal assistant like the Colonial Office.<sup>9</sup> The model so highly commended had been put into operation in the Colonial Office in 1867. Previously the need for a source of skilled legal opinion in that department had been admirably met by the work of its permanent under-secretaries, James Stephen and Frederic Rogers, both of whom were well versed in the law.<sup>10</sup> Then, in 1867, the Treasury approved the permanent reorganization of the Colonial Office; one senior clerk was eliminated and in his place a legal adviser was appointed.<sup>11</sup> The first appointee was Henry Thurstan Holland, later to become a secretary of state for the colonies. The duties of the legal adviser were various—to examine and report upon all acts and ordinances from colonial legislatures, to prepare Letters Patent, Royal Instructions, Orders in Council, bills for Parliament, and examine instruments sent to the Colonial Office for approval. Furthermore, he was to prepare references of legal questions for the law officers and generally assist in advising on any departmental legal business.<sup>12</sup> In these tasks, he had the assistance of a clerk, Adam Adrian; in 1880, that position became known as clerk of the legal instruments.<sup>13</sup>

9. Third report, H. of C. No. 199, p. 70, *P.P.* 1877, XXVII.

10. At an earlier stage in his career (1813–25) Stephen had been briefed as an external legal adviser; and see Appendix.

11. Order in Council, February 2, 1867, C.O. 878/1/159; for historical background of 1867 appointment, see Bruce A. Knox, "The Provision of Legal Advice, and Colonial Office Reorganization, 1866–7," *Bulletin of Institute of Historical Research*, XXXV (1962), 178–97.

12. Carnarvon to Holland, January 8, 1867, C.O. 323/289; Rogers, circular to departments, March 24, 1868, C.O. 878/4.

13. Adam Adrian entered Colonial Office in 1835 and kept the post until 1880 when he retired; he was succeeded by F. O. Adrian; and see, Ebdon to Meade, February 19, 1872, C.O. 878/6.

In 1870, the Colonial Office asked for a reconstitution of the office of legal adviser so as to elevate Holland to the position of assistant under-secretary. From the very beginning, in fact, it had been the tendency in the Colonial Office to regard the post of legal adviser as being equivalent to that of assistant under-secretary. This was evidenced, for example, by the salary claims made by the Colonial Office on Holland's behalf, ranking his service from the date of his appointment at the same level as that of assistant under-secretary.<sup>14</sup> Initially, the Treasury protested against combining legal duties with the administrative duties of an assistant under-secretary.<sup>15</sup> But eventually the Treasury accepted that this was the most suitable arrangement for the Colonial Office; the alternative, to which the Treasury most strenuously objected, was to appoint an additional assistant under-secretary at additional cost, and, accordingly, Holland was officially elevated in rank. The arrangement involved the abolition of the office of legal adviser and in its place, a second assistant under-secretary was appointed, upon condition that one of them should always be a barrister of not less than five years standing.<sup>16</sup> The new post was referred to, although not correctly, as legal assistant under-secretary. New instructions for the department were prepared to the effect that all acts, ordinances and papers on legal matters were to be sent to Holland; he was also to be responsible for two of the geographical departments.<sup>17</sup>

When, in 1874, Holland resigned his post at the Colonial Office for a career in politics, a reassessment was made of the organization of the Colonial Office. At that time two of the senior staff were lawyers—Holland and Robert Herbert, who had already had six years' practical colonial experience as chief secretary in the colony of Queensland. Of these two Herbert showed himself to be more distinguished in his handling of foreign juris-

14. Colonial Office correspondence with Treasury during 1872–73, see C.O. 323/309/9469 and 12267.

15. Sandford to Granville, January 10, 1870, P.R.O. 30/29/75; Stansfeld to Granville, January 21, 1870, P.R.O. 30/29/75, Granville MSS.

16. Order in Council, March 31, 1870, C.O. 878/1/162.

17. Rogers, circular to departments, April 8, 1870, C.O. 878/5.



diction problems than Holland. The latter was efficient but pedestrian; the former added a touch of administrative finesse along with sound common sense to whatever problem was presented to him. The two worked together efficiently and so Lord Carnarvon, the secretary of state for the colonies, was led to conclude that it was "desirable that two of the Under Secretaries should be Barristers possessing a practical knowledge of law."<sup>18</sup> From his experience he knew that in the past there had been occasions when too much work had been thrown upon Holland acting single-handedly. And so another assistant under-secretary was appointed.<sup>19</sup> Julian Pauncefoot filled the post. He also was a trained lawyer, and, like Herbert, had already had some colonial experience. In 1855 he had been private secretary to Sir William Molesworth when he was colonial secretary. Eight years later Pauncefoot went to Hong Kong and within three years was attorney-general. In 1874 he accepted the post of chief justice of the Leeward Islands, only a temporary appointment.

Lord Carnarvon placed great value on having two trained lawyers on his staff. When the Treasury, ever persistent with schemes to effect new economies, made a proposal concerning superannuation, the effect of which would have revived the actual office of legal adviser but probably would have eliminated other trained lawyers, the colonial secretary objected strongly. He said one barrister was not enough for the needs of the office. Since 1867 there had always been, in fact, two barristers among the permanent and assistant under-secretaries. And, since all the assistant under-secretaries alike took part in the general administrative work of the office, it was erroneous to name one of the positions legal assistant under-secretary. Furthermore, so far as Carnarvon was concerned, it was important that he be allowed to go outside the Civil Service (and his own department) to fill positions at the level of assistant under-secretary. He wanted to be free to choose well qualified persons, like barristers and other

18. Carnarvon to Herbert, September 5, 1874, C.O. 878/5. He was including assistant under-secretaries.

19. Treasury to Carnarvon, March 16, 1877, Carnarvon to Treasury, April 18, 1877, C.O. 323/332/3115.

people with professional and special qualifications; and obviously, to do so salaries had to be attractive.

This organization continued for the next two decades, and there were always at least two barristers out of the total of four permanent and assistant under-secretaries<sup>20</sup>—Herbert (from 1870 until 1892); William Malcolm (from 1874 until 1878); John Bramston (from 1876 until 1897); Edward Wingfield (from 1878 until 1900); and Edward Fairfield (from 1892 until 1897).

In 1897, Joseph Chamberlain, the colonial secretary, carried out another reorganization of the system of legal advice. Wingfield was appointed permanent under-secretary, Fairfield died, and Bramston retired at the end of the year. It was acknowledged that two qualified barristers were necessary to carry on the Colonial Office's legal business.<sup>21</sup> The idea that Wingfield, as permanent secretary, might be able to continue to take a share of the legal work was disapproved of; he would not have the time to deal with the numerous and often heavy legal questions that arose. So, the proposal was put up by the Colonial Office and accepted by the Treasury that one of the three assistant under-secretaries should continue to be a barrister of experience;<sup>22</sup> the other two would be appointed by promotion or by selection from other departments of the Civil Service. But the legal assistant under-secretary would need help and so the post of legal assistant was created. He also was to be a barrister, selected from either the Bar or the Colonial Service. His duties included the examination of colonial ordinances and other legal work of lesser importance. The Treasury approved the new post and it was filled by Chamberlain's private secretary, Henry

20. For a general survey of the Colonial Office during this period, see John Bramston, "The Colonial Office from Within," *Empire Review*, I (1901), 279-88. Background on the organization of the office in the mid-Victorian period is to be found in John W. Cell, *British Colonial Administration in the Mid-Nineteenth Century: The Policy-making Process* (New Haven: Yale University Press, 1970), chap. i; also refer to McIntyre, *Imperial Factor*, pp. 17-74. For the late 1890s, refer to Robert V. Kubecek, *The Administration of Imperialism: Joseph Chamberlain at the Colonial Office* (Durham, N.C.: Duke University Press, 1969).

21. See, however, contrary view of Selborne, the parliamentary under-secretary, to Chamberlain, January 21, 1897, private, Joseph Chamberlain MSS 9/7/50. The suggestion that one legal adviser was sufficient was not endorsed.

22. Chamberlain to Treasury, May 17, 1897, C.O. 323/417/4830. A fourth assistant under-secretary was appointed in 1898.

Francis Wilson.<sup>23</sup> Later in the year, after Bramston had retired, Hugh Bertram Cox was appointed legal assistant under-secretary.<sup>24</sup> Cox had for a number of years devilled for the Conservative attorney-general, Webster, and so had experience with all kinds of government work, including references from the Colonial Office and the Foreign Office, the preparation of Orders in Council, parliamentary matters, schemes from the Privy Council.<sup>25</sup>

So during the late nineteenth century (until 1897), regardless of the terminology applied to the legal advisers, there were always at any one time at least two qualified lawyers among the senior departmental officers (the permanent and assistant under-secretaries) and that was one half of the senior administrators. And the Colonial Office always claimed and justified the need for that amount of legal expertise. At the same time these officers were not concerned solely with legal problems but carried out their share of the general administrative work.

At the Foreign Office, during the 1860s and the early 1870s, the arrangement was different from that of the Colonial Office. The former generally referred legal problems to an outside authority—either the queen's advocate, the law officers of the crown, or both. But in 1872 the office of queen's advocate was abolished and the situation drifted unsatisfactorily with the law officers trying to handle all references. Numerous complaints were made. In 1873, Sir William Harcourt, the solicitor-general, prepared a memorandum urging a change in the system but soon afterwards he was out of office and the scheme was not acted upon.<sup>26</sup> Early in 1876 he wrote to a former Liberal foreign secretary condemning "the ramshackle and hugger-mugger way in which the law business of the Foreign Office is conducted."<sup>27</sup> Also, Karlslake,

23. Wilson, see Appendix; Treasury to Chamberlain, May 25, June 5, 1897, C.O. 323/417/11033; Wilson to Chamberlain, May 28, 1897, Joseph Chamberlain MSS 9/7/57.

24. Cox, see Appendix.

25. Cox to Chamberlain, March 11, 1897, C.O. 323/425/5191.

26. Harcourt to Lister, December 16, 1873, and memorandum by attorney-general and solicitor-general for foreign secretary, n.d., Harcourt MSS.

27. Harcourt to Granville, January 21, 1876, printed in Alfred G. Gardiner, *The Life of Sir William Harcourt* (London: Constable & Company, Ltd., 1923), I, 298.

giving evidence before the 1875 House of Commons committee into government legal business, urged the Foreign Office to follow Colonial Office practice.<sup>28</sup> While in office he complained that he had been burdened down with Foreign Office business—papers that had accumulated for four or five years, containing a variety of reports from successive law officers.

The House of Commons committee reported in favor of the appointment of an additional assistant under-secretary for the Foreign Office to transact its legal business. The report was accepted by the Foreign Office and the Treasury and the new post was created in 1876.<sup>29</sup> It was to be filled by a gentleman possessing legal qualifications sufficient to enable him to advise the secretary of state in all ordinary cases; and, apart from preparing cases for reference to the law officers, he was to share in the general business of the department.<sup>30</sup>

The creation of the new post was a sensible move since there were many matters which could be handled solely internally—such as the status and rights of British subjects in foreign countries.<sup>31</sup> Furthermore, there was an increasing need to have within the office a person with a knowledge of international law at a time when the interests of foreign countries were coming into competition and conflict in all parts of the globe. Julian Pauncefote, who had been capably handling work of a similar nature at the Colonial Office, accepted the new post at the Foreign Office. Overall, the arrangements were very similar to those of the Colonial Office, except it was not felt necessary to have two legally qualified persons. The original instructions indicated that his duties were to be legal, but in the rearrangement of office business consequent upon the creation of the new post, Pauncefote was also assigned the supervision of the slave trade business and South and Central American affairs.<sup>32</sup> The Treasury, furthermore, looked upon the creation of the new post as a means of

28. Karslake, June 10, 1875, H. of C. No. 199, p. 45, P.P. 1877, XXVII.

29. See Treasury to Derby, January 31, 1876, Treasury 12/8.

30. Treasury to Derby, July 7, 1876, Treasury 12/8.

31. Robert B. Mowat, *The Life of Lord Pauncefote, First Ambassador to the United States* (London: Constable & Co. Ltd., 1929), p. 29.

32. Memorandum, Tenterden, July 17, 1876, F.O. 366/386.



effecting greater savings in the transaction of legal business. Hitherto, the practice had been for the Foreign Office to instruct the parliamentary draftsman to prepare Orders in Council, for example, in respect of the exercise of foreign jurisdiction. When, in 1877, the Foreign Office in its usual fashion sought the assistance of Francis Reilly, the parliamentary draftsman, in the preparation of an Order in Council under the Foreign Jurisdiction Act for China and Japan the Treasury rebuked the Foreign Office for its extravagance in legal business; and it was requested that in future the Foreign Office should consider the possibility of providing less expensively for the performance of similar duties by instructing Pauncefote to prepare a draft of the order.<sup>33</sup>

The Foreign Office did not agree with the request. Although it was accepted that Pauncefote's duties included the drawing up of certain legal documents (of a routine and common-form nature) it was denied that his duties included the preparation of documents of the kind in question.<sup>34</sup> The difference was that Orders in Council relating to foreign jurisdiction had the force and effect of Acts of Parliament and therefore needed to be settled by the parliamentary draftsman. Pauncefote could not be expected to undertake such work in addition to his ordinary duties without a clerical staff and a salary commensurate with the professional skill, labor, and responsibility involved. Also, it was pointed out that there was risk of confusion and error if it became the general practice that legal officers in the various government departments should undertake the preparation of occasional amendments and additions to such orders. Furthermore, the fact that such orders were usually referred to the law officers for final approval was no absolute safeguard since they were not and could not be expected to be familiar with the numerous details of the whole problem. So, the Foreign Office asserted that it was safer to entrust such work to the professional draftsman by whom the order was originally framed. The Treasury and the Foreign Office could not agree on the extent of the duties of the assistant under-secretary responsible for legal ad-

33. Treasury to Derby, February 14, 1877, Treasury 12/8.

34. Derby to Treasury, March 1, 1877, F.O. 17/774.



vice.<sup>35</sup> Two years later, in 1879, Pauncefote complained of the pressure of work:

the object of my appointment was to 'advise' and prepare cases for Law Officers but the distribution of work of the office has been completely changed by my appointment, and I do the work of an able-bodied Under-Secretary if not of two, in addition to my legal duties.<sup>36</sup>

Pauncefote's work at the Foreign Office was highly valued. Lord Salisbury, in particular, had a special regard for Pauncefote's ability. In 1880 the former arranged for Pauncefote to receive the Companionship of the Bath and five years later the Order of St. Michael and St. George.<sup>37</sup> Again, in 1899, the question arose whether Britain should send a legal expert, like Professor Thomas Erskine Holland, the Chichele Professor of International Law at Oxford University, to the Hague Peace Conference; Salisbury answered simply: "I doubt if we want one. Pauncefote knows as much law as anybody."<sup>38</sup> At the level of the particular his handling of foreign jurisdiction problems was quite sound although not very innovative.

The problems of work and pay were answered partially in 1882 when the Treasury agreed, although reluctantly, to provide a special allowance for the transaction of legal business by Pauncefote.<sup>39</sup> In return, Pauncefote had to agree that upon the retirement of Reilly he would undertake the preparation of Foreign Office Orders in Council. In October of the same year Pauncefote was promoted to the rank of permanent under-secretary, carrying with him his legal duties as before.<sup>40</sup> In this appointment, Lord Granville, the foreign secretary, broke tradition since Pauncefote was neither a diplomat nor a Foreign Office clerk

35. See memorandum, Pauncefote, September, 1877, F.O. 97/499.

36. Pauncefote to Salisbury, May 20, May 26, August 16, 1879, Salisbury MSS.

37. Pauncefote to Salisbury, December 25, 1879, January 10, April 22, 1880, November 18, 1885, Salisbury MSS. Salisbury and Pauncefote were on very cordial terms.

38. Minute, Salisbury, *ca.* April 10, 1899, Salisbury MSS. Pauncefote was an ambassador at this stage.

39. Granville to Treasury, July 26, 1882; Treasury to Granville, August 17, 1882, F.O. 97/499.

40. Granville to Treasury, October 16, 1882, F.O. 366/678.

but had started out in the Colonial Service and was a lawyer;<sup>41</sup> it was an undoubted tribute to his ability.

Pauncefote carried this double load for four years until 1886; but the amount of work, especially legal business, was continually increasing. The solution was to create a special legal branch, such as had happened in the foreign offices of other countries where there normally was such a branch—*contentieux*.<sup>42</sup> In 1886 the Treasury agreed that a joint Foreign Office-Treasury committee should enquire into the state of the legal and general business of the office. Its preliminary report recommended material alterations including the appointment of a barrister as counsel to the Foreign Office.<sup>43</sup> He should have an official room and attend daily to advise on legal questions and prepare cases for the opinion of the law officers. With such an appointment it would be possible to dispense with the more informal arrangement that had been made after the abolition of the office of queen's advocate whereby a counsel was appointed to assist the law officers with advice on legal problems of the Foreign Office. Dr. James Deane had been rendering such help to the law officers since 1872.

The Foreign Office endorsed the report, adding that a clerk should be provided to help the new officer. William Davidson received the appointment of legal assistant or adviser, upon the recommendation of the attorney-general and the lord chancellor for whom he was at the time private secretary. He had also for a number of years assisted successive law officers in the preparation of their reports for government departments.<sup>44</sup> His instructions at the Foreign Office were to act under the general superintendence of the permanent under-secretary, and his duties were to be strictly legal. Since this greatly reduced the burden on Pauncefote the latter decided to take over the whole superintend-

41. Lord Edmond Fitzmaurice, *The Life of Granville George Leveson Gower, Second Earl Granville, K.G., 1815-1891* (London: Longmans, Green, and Co., 1905), II, 452.

42. Rosebery to Treasury, June 12, 1886, F.O. 366/724.

43. "Preliminary Report of Committee Appointed to Enquire into the State of the Legal and General Business of Foreign Office," June 4, 1886, F.O. 97/499.

44. Pauncefote to Rosebery, n.d., F.O. 366/724; Treasury approval given August 2, 1886, Treasury 12/14.

ence of the treaty department which had become a quasi-legal department.<sup>45</sup>

Davidson had high notions of his own importance and sought to elevate the significance of his post. Other officials were not so convinced of his worth. Villiers, a Foreign Office clerk, observed six months after the appointment that

the soul of Davidson continues to be vexed. His pretensions with regard to his personal position have been squashed, but he has been given rooms on the upper floor—the same as that occupied by the Resident Clerks—which has hurt his dignity very much and whence he utters shrieks of indignation. I think he will eventually be brought down again [to the first floor]. Meanwhile a little isolation in what he calls ‘the attics’ will do him no harm.<sup>46</sup>

Age does not seem to have improved his worth. Ten years later, when he was being considered for the post of assistant under-secretary of the Colonial Office, Sanderson, the permanent under-secretary at the Foreign Office, described Davidson as a good legal adviser, sound and painstaking but

for administrative business he has some serious defects. He has no experience of it—is slow, lengthy, inclined to small criticisms on questions of grammar and orthography—not very fond of long or close hours of attendance. He would be a very bad choice for an Assistant Under-Secretaryship here but at Colonial Office possibly some of these failings might be less inconvenient.<sup>47</sup>

Davidson never rose to the rank of assistant under-secretary. This failure to receive promotion led him to complain: “I never communicate with anyone, or send papers about the business of the office except unofficially.”<sup>48</sup> But this overall superintendence to which he was subjected seemed necessary. He was inclined to shirk responsibility for a decision or seek to deny authorship if the advice led to unfavorable consequences; or, alternatively, having made a decision, he could be most determined in his per-

45. Pauncefote to Iddesleigh, October 6, 1886, F.O. 366/724; Pauncefote to Iddesleigh, October 6, 1886, F.O. 366/386.

46. Villiers to Rosebery, January 28, 1887, private, Salisbury MSS.

47. Sanderson to Salisbury, January 1, 1897, private, Salisbury MSS. The Colonial Office did not choose Davidson.

48. Minute, Davidson, June, 1888, F.O. 84/2271.

sistence as to its correctness, regardless of the weight of contrary opinions against him. Other officers sometimes bypassed consulting Davidson even though a legal problem was involved; frequently he would minute, "I have seen this for the first time accidentally today," when the matter had been in circulation a number of months.<sup>49</sup> His opinions tended to be so circumlocutious, verbose, legalistic, and particular that it was not surprising that under-secretaries tended to avoid him. His failure to be able to strike at the heart of a problem came through quite clearly in his handling of problems concerning jurisdiction over foreigners and others. But on one notable occasion, concerning Bechuana-land in 1885, he came to the conclusion which ultimately in the 1890s became acceptable law and this was despite the fact that his opinion disagreed with that of his superior, Gorst.

Just before he went out of office in 1894, Lord Rosebery provided a clearer definition of the position of the legal adviser.<sup>50</sup> It was not an under-secretaryship, either in title or in fact, since that position was a channel for the executive business of the office. The legal adviser, by contrast, was "a post of reference and advice from one single point of view." So it was a distinct post, at a level almost equivalent to that of under-secretary.<sup>51</sup>

The Foreign Office, by contrast with the Colonial Office, seems to have followed a more consistent line with regard to the need to retain the official post of resident legal adviser once the position had been created. But it should also be noted that only one trained lawyer was considered necessary for the needs of the former office. One possible explanation for this is that legal theory did not play so great a role in foreign affairs as it did in colonial affairs. This is reinforced by the fact that the creation of the post of legal adviser came at a later date in the Foreign Office than in the Colonial Office. At the same time the former resorted more frequently to external sources (especially the law officers) than did the Colonial Office. Another tendency in the Foreign Office was to separate legal matters from policy matters in a way

49. For example, minute, Davidson, November 9, 1899, F.O. 2/549.

50. Rosebery, March 8, 1894, F.O. 366/760.

51. In 1902, an assistant legal adviser was appointed.



that did not occur in the Colonial Office. This was not apparent under Pauncefote but once the special legal post was created there was a definite split.

Two other legal or quasi-legal sources of knowledge existed in the Foreign Office. One was the treaty department, under John H. G. Bergne, and later Charles Robertson.<sup>52</sup> They were not lawyers but found that a knowledge of international law and precedents was necessary.<sup>53</sup> The Foreign Office was also fortunate in that the librarian happened to be a source of legal knowledge. Between 1847 and 1896 the office was occupied by Sir Edward Hertslet, who, although not a qualified lawyer, was particularly well-versed in the contents of treaties. And he prepared many able reports on the historical background of legal problems wherein the interpretation of treaties and other documents was involved. His memoranda provided valuable material upon which the law officers and other legal advisers could work. "The many instances in which questions of precedents have been answered through this valuable collection of papers has fully established its usefulness."<sup>54</sup> Hertslet built up a European-wide reputation through his publications. Between 1871 and 1895 he continued in eight volumes the compilation of the series started by his father of treaties and conventions between Great Britain and foreign powers (commonly known as *Hertslet's Treaties*). Another of his useful editorial works was *The Map of Africa by Treaty* which he completed in 1894.

Although a major source of legal theory and of legal advice on actions to take and policies to adopt came from within the two departments—from resident legal advisers—there were limitations upon this source. No matter how competent, qualified, and skilled such people as Pauncefote and Bramston might have been they could not, for practical reasons if for no other, undertake to carry out all the legal business of their respective departments.

52. Bergne and Robertson, see Appendix.

53. Tenterden, November 28, 1874, F.O. 366/677; memorandum, "The system under which the business of the British Foreign Office is conducted," March 31, 1886, February 4, 1890, F.O. 366/724.

54. Memorandum, "Duties Imposed on the Librarian's Department of the Foreign Office and Salaries," January 20, 1871, F.O. 366/677.



For reasons of time alone it was not possible for those advisers to deal fully with complicated legal questions as well as carry on with their usual departmental tasks. So it was necessary to refer some matters to outside legal authorities and most frequently to the law officers of the crown. As a broad and simple rule the latter were referred to whenever any legal problem of the Colonial Office or the Foreign Office was too difficult to be solved speedily and easily within the office itself or was of sufficient general and public importance to warrant the reference. The advantage of this system of "appeal" was that it allowed a second opinion, probably more impartial and hopefully more authoritative, to be taken on a difficult or important point. This was a safeguard against a possible erroneous judgment by the legal adviser within the office. The opinion of the law officers was meant to be based almost solely upon points of law and not of policy—but sometimes the personality of a law officer did intrude.<sup>55</sup>

The law officers, although political appointments, were expected generally to put themselves above party considerations. They were servants of the crown with the duty of assisting the government or a department when asked to do so with advice as to the legality of a particular action or policy. Fairfield, an assistant under-secretary of the Colonial Office, was quite accurate in his description of them as being not really members of the administration but a parliamentary queen's counsel in a state of "animated expectancy," from time to time honored by the commands of the administration to advise it.<sup>56</sup>

The attorney-general and the solicitor-general were the principal law officers, but until 1872 there was also a queen's advocate. The attorney-general and the solicitor-general changed with each government, the appointment going to successful barristers of the governing party. Generally the law officers were not members of the cabinet. One reason for this was that it was preferable to obtain legal advice which could not be deemed to be affected

55. See John L. J. Edwardes, *The Law Officers of the Crown* (London: Sweet & Maxwell, 1964) for general discussion of the role, and historical background, of the law officers of the crown.

56. Minute, Fairfield, January 6, 1894, C.O. 417/132/356.

directly by knowledge of its implications.<sup>57</sup> In any case, another legal adviser, the lord chancellor, was a member of the cabinet and when the need arose he could bridge the gap between law and policy. But the law officers considered all important legal problems, at least in their initial stage, and in this capacity had a significant role to play in foreign and international matters. And through their knowledge of international law and constitutional law as expressed in their opinions they were able to assert an influence on the course of imperial expansion.<sup>58</sup>

Generally the law officers were not important as politicians. Sir William Harcourt, however, took a different view. He considered the law officers should have a role in cabinet discussions in addition to legal duties. Only occasionally, however, were they requested to attend cabinet meetings but they did spend much of their time in ministerial committees and conferring with government departments on particular problems.<sup>59</sup> Another duty was to assist a department in the drawing of bills; although most of this work devolved upon the parliamentary draftsman the law officers were responsible for settling the bill in a fit and final form to be introduced into parliament. And they gave final approval to the drafting of other documents of a legal nature.

In addition to the duty of advising on the legality of the government's actions it was the function of the law officers to defend the government in the House of Commons and to advise the House whenever a legal point was involved.<sup>60</sup> Sometimes, of course, law and policy considerations shaded inseparably into one another and the lawyers found themselves advising on general policy matters. Sir John Coleridge,<sup>61</sup> solicitor-general from

57. Arthur Berriedale Keith, *The Constitution of England from Queen Victoria to George VI* (London: Macmillan and Co. Limited, 1940), II, 87.

58. See comments of James W. Norton-Kyshe, *The Law and Privilege Relating to the Attorney-General and Solicitor-General of England . . . Queen Victoria* (London: Stevens & Haynes, 1897), p. 77; also, Thomas A. Nash, *The Life of Richard Lord Westbury, Formerly Lord High Chancellor with Selections from His Correspondence* (London: Richard Bentley and Son, 1888), II, 130-31.

59. Baggallay, May 3, 1875, H. of C. No. 199, p. 20, P.P. 1877, XXVII.

60. H. Fawcett, June 21, 1872, Great Britain, 3 *Parl. Deb.*, CCXII (1872), 48-49; Harcourt, March 22, 1889, 3 *Parl. Deb.*, CCCXXXIV (1889), 547.

61. Coleridge, see Appendix.

1868 until 1871, complained of this to his father: "it seems to me, all the different departments, when they don't know exactly what to do, no matter whether law is involved or not, sling a case at the head of the law affairs [sic]." <sup>62</sup> On a number of occasions the law officers were called up to explain in the House the legal position of a British subject who had been outraged or had himself misbehaved in a primitive area outside British jurisdiction.

The Colonial Office called upon the services of the law officers for a variety of issues. They gave advice on the validity of colonial acts and ordinances, the constitutionality of institutions and their powers, maritime matters, fisheries, trade and commercial arrangements, the interpretation of treaties, naturalization, marriages, along with a great many ecclesiastical matters.<sup>63</sup> And from the Foreign Office the more common problems concerned claims of foreign countries, extradition and arrests, the interpretation of treaties, fishery rights, customs duties. Wars and blockades brought a rash of legal questions especially during the Boer War.<sup>64</sup>

It is difficult to describe exactly what were the relations between the law officers on the one hand and the Colonial Office and the Foreign Office on the other. From a theoretical point of view relations should have been good since the law officers were supposed to be servants of the two offices. Charles Dilke, when parliamentary under-secretary for the Foreign Office in the early 1880s, found the law officers very helpful and gave enthusiastic praise.

There never were such Law Officers as James and Herschell. They did their work with extraordinary promptitude and decision and with the

62. J. D. Coleridge to father, December 30, 1868, in Ernest H. Coleridge, *Life and Correspondence of John Duke, Lord Coleridge, Lord Chief Justice of England* (London: William Heinemann, 1904), II, 161.

63. The Colonial Office referred a few matters to the queen's advocate and after the abolition of that post to Dr. Deane.

64. Notice, for example, that comparing 1860 and 1900 the number of references to the law officers rose, in the case of the Colonial Office, from forty-seven to sixty-four (as revealed in the bound volumes of yearly law officers' opinions); some Foreign Office references were included in cases where they were of general interest to the Colonial Office; refer generally to C.O. 885. The Foreign Office equivalent is F.O. 834.

highest possible skill. They never differed, and they always gave us exactly what we wanted in the best form.<sup>65</sup>

He was not so inclined to praise earlier law officers, such as Roundell Palmer, the current lord chancellor, whom he found, although perhaps a greater lawyer, to be too legalistic and unintelligible to the layman. In fact, this opinion of Dilke on Palmer's legalism proved to be quite correct when the latter began pronouncing on protectorate problems in the mid-1880s. Dilke's overall observations also are important for the reason that he correctly highlighted the condition necessary to establish a successful relationship between the law officers and the department seeking legal advice—that the former give what the latter wanted. It was the duty of the lawyers to be agreeable and helpful, to find a legal solution for the course of action or the policy desired, rather than to put legal and theoretical obstacles in the way of action, something which could be all too easily done. There were, of course, occasions when the obstacles could not be avoided or overcome; and then it was the duty of the law officers to minimize the difficulty as much as possible. So far as Dilke was concerned, and this was generally true, questions referred by the Foreign Office to the law officers often incorporated policy considerations; and so Dilke was pleased if the legal opinions were elastic and practical rather than legalistic and theoretical.

If Dilke was pleased with the way the law officers handled work the latter were not always pleased with the way the Foreign Office initiated legal problems. In evidence given before the Government Legal Business Committee of 1875, Richard Baggallay,<sup>66</sup> the attorney-general, offered strong criticism of the Foreign Office preparation of references.<sup>67</sup> Often all the papers were thrown together in a bag without any *précis*; and on occasions the lawyers read through all the papers only to find there was no legal question to answer. On other occasions the matter should

65. From Charles Dilke's diary, November 22, 1882, in Stephen Gwynn and Gertrude M. Tuckwell, *The Life of the Rt. Hon. Sir Charles W. Dilke* (London: John Murray, 1917), I, 553–54. Dilke went on to praise James and Herschell as being "unsurpassed and unsurpassable."

66. Baggallay, see Appendix.

67. Baggallay, May 3, 1875, H. of C. No. 199, pp. 16–17, *P.P.* 1877, XXVII.



have gone to a junior counsel and not to people as busy as the law officers. Sir William Harcourt agreed with him that the Foreign Office was the main offender in sending cases not involving legal points. Anything that was not very clear was put into a big canvas bag at the Foreign Office and sent to the law officers with the request "Lord Granville would be pleased to have your opinion upon the enclosed papers."<sup>68</sup> It was partly to overcome this deficiency on the part of the Foreign Office that the committee suggested that a legal adviser be appointed within that office.

Not all the law officers were critical of the Foreign Office system. Roundell Palmer, who had been a law officer in the 1860s, perhaps was exceptional in his attitude but he approved the procedure wherein a department, rather than stating a "case" upon a definite question arising out of the facts, sent all the relevant papers in which answers based on points of law might arise.<sup>69</sup> He agreed that it was arduous work sorting through the material but he preferred that to having some official in one of the government departments extracting the relevant facts—perhaps wrongly. Palmer chose to take responsibility for verifying the facts as well as the law. But his attitude seems not to have been shared by other law officers who complained that they were already sufficiently overworked without having the additional task of sorting through masses of papers, often irrelevant.

The most frequent criticism made of the law officers related to the delay in obtaining an opinion from them. A possible cause of this lay in the lack of organization, in the sense that until 1893 there was no official Law Officers' Department. It was difficult to distinguish the law officers from any other practising barrister, except that they handled a great deal of government business. This they carried out in their chambers, like regular private briefs. Important cabinet documents, which in the normal routine of government affairs were kept in locked boxes, were car-

68. Harcourt, May 27, 1875, H. of C. No. 199, p. 31, *P.P.* 1877, XXVII.

69. Roundell Palmer, *Memorials* (London: Macmillan and Co., 1896-98), II, 378-79. He did not name any particular department but his description of procedure fitted that of the Foreign Office.



ried loose in open envelopes from the attorney-general's chambers to the solicitor-general's chambers by aged clerks.<sup>70</sup>

Furthermore, there was always a certain amount of public criticism of the old system wherein the law officers were treated as private barristers jobbed piecework by the crown. Politicians frequently condemned the casualness of the system which for instance had cost the government £3,000,000 when the *Alabama* claims case was settled in 1872.<sup>71</sup> James Bryce wrote a constructive article in 1870 condemning the existing practice and advocating the establishment of a distinct department to handle the government's legal work.<sup>72</sup> He hoped that if the law officers were given a permanent staff their work would not be so hurriedly and imperfectly done.

In 1872, Henry Fawcett, a radical politician and political economist, introduced a motion into the House of Commons criticising the right of the law officers to engage in private practice and urging that they should conduct only public work.<sup>73</sup> At the 1875 committee to inquire into government legal business Harcourt, drawing from personal experience, recommended that the law officers should have a fixed staff, knowledgeable in such business. In his opinion the existing system was fraught with danger since the papers were sifted through for relevant points by the "accidental clerk of a barrister who happened to be made a law officer."<sup>74</sup> He remembered that when he and James became law officers their clerks knew nothing about the business and there was only one man, very old, upon whose life depended the whole tradition of conducting the law officers' work. But that com-

70. Harcourt, May 27, 1875, H. of C. No. 199, p. 30, *P.P.* 1877, XXVII.

71. Robert F. V. Heuston, *The Lives of the Lord Chancellors, 1885-1940* (Oxford: Clarendon Press, 1964), p. 329.

72. James Bryce, "The Organization of a Legal Department of Government," *Fortnightly Review*, XIII (N.S.) (1873), 316-32; John Edwardes, *The Law Officers*, p. 3, refers to the necessity since the days of Lord Chancellor Brougham (1830s) of creating a separate Ministry of Justice.

73. Fawcett, June 21, 1872, 3 *Parl. Deb.*, CCXII (1872), 48-51; note the adverse comments made by John Coleridge, attorney-general (Coleridge to father, April 23, 1872, in Ernest Coleridge, *Life . . . of Coleridge . . .*, pp. 210-11) and of George Jessel, solicitor-general (Israel Finestein, "Sir George Jessel, 1824-1883," *Transactions, the Jewish Historical Society of England*, XVIII, (1953-55, 248-83).

74. Harcourt, May 27, 1875, H. of C. No. 199, p. 30, *P.P.* 1877, XXVII.

mittee reported against the establishment of a central office, mainly because of the difficulty involved in separating legal work from the ordinary work of a department, although it did make some suggestions tending towards centralization.<sup>75</sup>

Apart from his regular clerks held over from private practice, the attorney-general, as a queen's counsel, had the assistance of a devil, in this case the junior counsel to the Treasury; and work was also farmed out to young, aspiring barristers (private devils) by personal arrangement.<sup>76</sup> But, increasingly during the 1880s, the inadequacies of the system came to be felt. Lord Selborne, the lord chancellor, drawing upon his experience as solicitor-general and as lord chancellor, was convinced that the law officers should have a secretary to preserve the continuity of business.<sup>77</sup> And in 1886 the two current law officers, Webster and Clarke, established what the latter described as "a practical and satisfactory system."<sup>78</sup> They engaged (and paid from their own salaries) a very capable person, James Abbs, to act as their official clerk; later, in 1893, he became the chief permanent clerk of the Law Officers' Department. The practice was for Abbs to distribute opinion work from government departments alternately to the attorney-general and to the solicitor-general. Each wrote his opinion and sent it to the other for concurrence. Some matters, of course, required discussion before an opinion was written; and on those occasions when the two advisers could not agree separate opinions were written. Previously, for example, all references from the Foreign Office had gone first to the solicitor-general who drafted the opinion and then forwarded it to the attorney-general.<sup>79</sup>

This system became official in 1893. Gladstone arranged that

75. "Third Report, Legal Business Committee," December 3, 1875, H. of C. No. 199, p. 62, *P.P.* 1877, XXVII.

76. Edward G. Clarke, *The Story of My Life* (London: John Murray, 1918), p. 152 comments on the income and prospects of the junior counsel to the Treasury; see also, George R. Askwith, *Lord James of Hereford* (London: Ernest Benn, 1930), p. 131.

77. Selborne, n.d. (probably between 1884-88), Lord Chancellor's Office papers (hereafter L.C.O. 1/61).

78. Edward G. Clarke, *The Story of My Life*, pp. 259-60.

79. James Beresford Atlay, *The Victorian Chancellors* (London: Smith Elder & Co., 1908), II, 484.

the right of private practice by the law officers should be greatly curtailed. This upset Sir Charles Russell, the attorney-general, and perhaps as recompense it was decided that an official permanent staff should be sanctioned. There were to be four clerks, two as permanent clerks and two as private secretaries, with salaries paid by the Treasury, and accommodation was provided at the Royal Courts of Justice.<sup>80</sup>

Another criticism levelled at the law officers before the 1890s was their failure to keep records; this failing was also attributable to the lack of a permanent organization. The nonpreservation of records might seem surprising in the case of lawyers whose livelihood normally depended on a familiarity with precedents and established forms of procedure. Harcourt was, of all the law officers in the late nineteenth century, the one with the most constructive ideas for an efficient organization. One Foreign Office clerk said of him in 1873: "he has the instincts of the new broom."<sup>81</sup> His tenure of the solicitor-generalship was too short to allow changes to be effected but he was there long enough to experience the problems arising from a lack of systematization. One day, soon after he took up office, two cabs arrived outside his chambers and a number of "miscellaneous odd volumes" were tumbled into the streets.<sup>82</sup> These were the archives of the previous solicitor-general. There was no organization to the volumes; Colonial Office, Foreign Office, Treasury, Home Office matters were mixed in together, and they were by no means comprehensive or complete. Frequently a law officer would have to write back to the instructing department requesting copies of earlier law officers' opinions on the subject in question. Harcourt urged that each department should supply the law officers with an annual volume of their opinions, to be kept in permanent archives.

80. Memorandum, Russell to Gladstone, September 25, 1892, Cabinet papers 37/31, No. 26; Meade to Ripon, September 20 and 25, 1892, Ripon MSS, B.M. Add. MSS 43556, ff. 50, 65; Treasury Minutes, December 5, 1892, January 12, 1893, H. of C. No. 62, pp. 2-3, *P.P.* 1893-94, L; Edward G. Clarke, *The Story of My Life*, p. 306.

81. Lister to Granville, December 17, 1873, P.R.O. 30/29/106, Granville MSS.

82. Harcourt, May 27, 1875, H. of C. No. 199, p. 30, *P.P.* 1877, XXVII; Karslake gave similar evidence, June 10, 1875, p. 45.

By 1891, the archives of the law officers had begun to be organized on a more rational basis. Abbs, the chief clerk, asked the Colonial Office in the future to supply copies of reports.<sup>83</sup> The Foreign Office had already adopted that practice and the Colonial Office readily complied. Overall, the work of the law officers in matters of foreign jurisdiction and protection was not fully satisfactory and much of the fault seemed to arise through poor organization. Also, they generally were not sufficiently skilled in the problems that arrived for their opinion. So, not surprisingly, in the early period they tended to follow departmental advice. Then in the middle period—the 1880s—when they began to assert a more independent line their opinions led in an unsatisfactory direction; to the administrators it seemed an erroneous direction. Consequently after 1891 a reversal set in and they began to follow again departmental leads.

Until 1872 there was a third law officer, the queen's advocate-general. He assisted the law officers in matters of international law and also handled maritime and ecclesiastical matters. For the more simple problems the Foreign Office would refer to him alone; for the more difficult all three would be consulted. But, in 1872, the Treasury decided that when a vacancy arose on the retirement of the current holder, Travers Twiss, an inquiry should be held into the continuance of the office.<sup>84</sup> Twiss soon thereafter provided a marriage scandal which led to his premature resignation. Hammond, chief clerk at the Foreign Office, had warned against the abolition of the office, pointing out that it was in the interests of the Foreign Office to have a legal adviser of the highest authority who had made civil and international law his highest study.<sup>85</sup> But Lord Granville, the foreign secretary, after discussion with the chancellor of the Exchequer, was inclined to think a more economical but equally efficient system might be devised.<sup>86</sup> The attorney-general, Coleridge, had

83. Abbs to C.O., July 18, 1891, C.O. 225/37/14631; minute Davidson, *ca.* March 28, 1890, F.O. 97/562.

84. Treasury minute, January 22, 1872, Gladstone MSS, B.M. Add. MSS 4468, f. 6.

85. Hammond to Granville, March 24, 1872, P.R.O. 30/29/105, Granville MSS.

86. Granville to Coleridge, April 2, 1872, P.R.O. 30/29/77, Granville MSS.



no hesitation in recommending the abolition of the office;<sup>87</sup> but to avoid throwing a great volume of routine work onto the law officers it was decided that a counsel to the Foreign Office should be appointed. His duty was to advise the department in all ordinary matters, and to assist the law officers and advise them, if necessary, in the more important references. The attorney-general and the solicitor-general went on to suggest the person might have accommodation in the Foreign Office and be virtually an assistant under-secretary. The lord chancellor, Lord Hatherley, made a similar suggestion, that a law secretary might be appointed to assist the law officers and the lord chancellor in Foreign Office matters;<sup>88</sup> but these suggestions were not followed up.

Instead, Dr. James P. Deane was appointed as counsel to the Foreign Office, not as the equivalent of an assistant under-secretary but as a consulting counsel to assist in opinion work.<sup>89</sup> He held that post until 1886 when the position of legal adviser was created within the Foreign Office.<sup>90</sup> Deane's assistance to the law officers was valuable, indeed necessary. But there were still complaints from the law officers that with the abolition of the queen's advocate they had become liable for much more work; Baggallay in 1875 lamented that as a result of the change all matters now came to the law officers.<sup>91</sup>

At the apex of the structure of legal advice was the lord chancellor, third in the order of precedence and the highest judicial functionary in Great Britain. For government departments he was the ultimate authority. In the normal course of events a department having taken the advice of the law officers was virtually bound to accept it, no matter how inconvenient or perhaps incorrect the advice might be. On occasions the department might choose to ignore the advice, or at least not act upon it for the time being. But as a general rule it would obviously be

87. Coleridge to Granville, April 6, 1872, P.R.O. 30/29/73, Granville MSS.

88. Hatherley to Granville, April 8, 1872, P.R.O. 30/29/65, Granville MSS.

89. Coleridge to Treasury, April 26, 1872, P.R.O. 30/29/73, Granville MSS; report, "Legal Business Committee," H. of C. No. 199, p. 40, P.P. 1877, XXVII.

90. For a summary of the kind of work done by him, see Deane, June 3, 1875, H. of C. No. 199, pp. 34-36, P.P. 1877, XXVII.

91. Baggallay, May 3, 1875, H. of C. No. 199, p. 15, P.P. 1877, XXVII.



foolish for a department to act contrary to legal advice, unless another and higher legal authority, like the lord chancellor, also disagreed with the law officers. So, sometimes important matters would be referred higher, to see if the lord chancellor agreed with the law officers.<sup>92</sup> His opinion was the predominant one and, normally, it possibly had the advantage, so far as a government department was concerned, of being one shaped by considerations of policy as well as of law. The lord chancellor, by virtue of his regular attendance at cabinet meetings, as well as being a preeminent lawyer, was the person best suited to combine successfully the two considerations.<sup>93</sup> The nature of his office was such that he could take a broader view than the law officers.

The lord chancellor had a small personal secretarial staff (with traditional offices like purse bearer, sealer and gentleman of the chamber, clerk of the crown in chancery), but he had no permanent secretary until 1884.<sup>94</sup> The lack of continuity resulting therefrom was an inconvenience, especially in matters connected with the Statute Law Revision Committee and Court Rules. So, in 1883, Lord Chancellor Selborne asked for a permanent staff of three, headed by a permanent secretary.<sup>95</sup> In addition he wanted a private secretary for confidential, political communications. This was approved by the Treasury and Kenneth Muir Mackenzie, who had been Selborne's private secretary, was appointed the first permanent secretary of the lord chancellor's department.<sup>96</sup> Even so the improved staff position did not necessarily make for an increase in efficiency. Lord Halsbury was able to

92. Note, for example, the comments of Malcolm, February 28, 1877, C.O. 18/187/2211.

93. See, for example, the comments of Davidson, February 27, 1895, F.O. 83/1375; and, generally, Herbert Merillat (ed.), *Legal Advisers and Foreign Affairs* (Dobbs Ferry, N.Y.: Oceana Publications, 1964), pp. 110-15.

94. For description of lord chancellor's staff assistance, see Cairns to Selborne, April 8, 1880, private, Selborne MSS 1867/78; Cairns to Selborne, March 29, 1882, L.C.O. 2/262; Graham to Muir Mackenzie, April 24, 1883, L.C.O. 1/60.

95. Selborne to Treasury, August 15, 1883, L.C.O. 1/60; Selborne to Cairns, August 16, 1883, March 24, 1884, L.C.O. 2/262; Selborne to Treasury, April 3, 1884, L.C.O. 2/262; Treasury to Lord Chancellor, May 3, 1884, L.C.O. 2/262. Some of this correspondence is printed, "Copies of Correspondence Between the Lord Chancellor and the Treasury, from April 1884 to April 1885, on the Subject of the Permanent Rearrangement of the Staff of the Lord Chancellor; and of the Orders Thereon of the Lord Chancellor," H. of C. No. 408, P.P. 1888, LXXXI.

96. Palmer, *Memorials*, IV, 155-56.

misplace papers twice and to delay over fifteen months a decision on the protectorate views of Jenkyns and Ilbert.

Some ministers—notably Salisbury and Ripon—had little hesitation in referring matters to the consideration of the lord chancellor, perhaps without a prior reference to the law officers. And, as a rule, the law officers were quite compliant in accepting the greater authority of the lord chancellor. Webster wrote as follows to Lord Chancellor Halsbury on a military matter where there was some difference of opinion: “whatever my own views may have been I am only too glad to be guided in this matter by your far greater experience and wiser judgement.”<sup>97</sup> Davidson, although perhaps strictly correct, was probably being his usual cautious and pedantic self when he warned another Foreign Office clerk that calling in the lord chancellor as a quasi-court of appeal from the law officers was a practice that should be avoided.<sup>98</sup> He pointed out that they were tenacious and jealous of their position as law advisers of the crown. Of course, the foreign secretary and the colonial secretary had no hesitation in referring to the lord chancellor independently and privately as a cabinet colleague; but, in official correspondence, when it came to referring higher to the lord chancellor from the law officers, the approval of the relevant secretary of state was first obtained. And there were occasions when the lord chancellor himself accepted that he would have to act as watch-dog over the work of the law officers. Lord Herschell, when lord chancellor, was not confident that the two law officers, Reid and Lockwood, had the competence and experience necessary to carry out all the important work of the office. They “may knock out very fair work for practical purposes”;<sup>99</sup> but “I feel that in cases critical or even important I shall have to give more personal attention to Foreign Office matters than might be necessary with other Law Officers.” At the same time criticism can be levelled at the advice given by the lord chancellors themselves. In some of the extraterritorial matters that came before them the judicious combi-

97. Webster to Halsbury, October 11, 1889, Halsbury MSS.

98. Minute, Davidson, January 28, 1891, F.O. 63/1288.

99. Herschell to Rosebery, October 12, 1894, Rosebery MSS 67.

nation of law and politics that might be expected was not evident. This was especially so of Lord Selborne's advice on protectorates at the time of the Berlin Conference. Overall, in fact, it seems that the most satisfactory blend of legal theory and practice was to be found in some of the legally-trained advisers in the Colonial Office and the Foreign Office. The best example in this case was Bramston.

In addition to the law officers and the lord chancellor there were other external legal advisers, the most important being the parliamentary counsel, the parliamentary draftsman, and junior counsel to the Treasury. They acted upon instructions from the relevant department, given through the treasury solicitor, to draft documents—legislation, Orders in Council, and other instruments. Normally their roles were supine, offering no positive or constructive suggestions in the formulation of foreign or colonial policy. But, inevitably, the manner in which legislation was drafted shaped the outcome of policy and so this work had at least an indirect influence. And there were instances when their advice, given in the initial stages of drafting, did have a positive influence upon the direction of the action taken. Also, the ideas of Jenkyns and Ilbert given in 1888 in relation to new foreign jurisdiction legislation subsequently became central although they were not accepted at the time.

It was the duty of the parliamentary draftsman to frame Orders in Council. In this he knew more than any other legal authority and so could offer constructive advice in such matters as the exercise of foreign jurisdiction where a common procedure was by way of Order in Council. The law officers were mainly rubber-stamps in drafting and while the legal adviser resident within the Foreign Office was quite conversant with the topic he did not have the range of experience and the familiarity with the technicalities of the whole problem that the draftsman acquired through his preparation of numerous orders for different areas around the globe. So, for example, during the 1890s Albert Gray, who had acquired considerable experience as junior counsel, played a constructive part in effecting Foreign Office policy in East Africa. The two Orders in Council of 1897 and 1899 and

regulations concerning waste lands in East Africa were largely his work; the law officers did not offer very positive advice, nor did Davidson. Gray used the evidence and advice supplied by persons on the spot, like Commissioner Hardinge and Judge Cracknall, to assume jurisdiction over foreigners, to extend jurisdiction over natives, and to exercise authority over waste lands. Gray's memoranda on these points usually guided the course of action taken by the Foreign Office.<sup>100</sup>

The Foreign Office commended highly the work of this miscellaneous group of legal draftsmen in preparing Orders in Council and Rules of Court for foreign jurisdiction matters. Until 1883 the main person involved was Francis Reilly, the parliamentary draftsman; then Robert Wright, as a junior counsel, took over and in the 1890s his main replacement was Albert Gray, first as junior counsel and also after 1896 when he was appointed counsel to the chairman of committees in the House of Lords. Davidson recalled that when he devilled for Attorney-General Webster the latter would frequently call in Wright to assist him on such matters. The reference to the law officers was retained mainly as a matter of formality but it had the advantage that their sanction gave it a "public or ministerial weight" that did not attach to Wright's opinion.<sup>101</sup> Davidson also gave his praise to Gray: "his expert opinion on highly technical questions" was "naturally of more value than other people's."<sup>102</sup>

Another casual source of legal advice was the treasury solicitor; and, in certain matters, the legal advisers of other government departments would contribute, for example, the Home Office in extradition matters. Henry Rothery, who was legal adviser to the Treasury in slave trade questions during the 1860s and the early 1870s, participated in some of the legal questions concerning the Pacific. But such advice was occasional and gratuitous.

Overall the system of advice worked reasonably well. The

100. Note, for example, the report of Gray, October 23, 1895, and his memorandum on Orders in Council, March 1896, F.O. 2/142.

101. Minute, Davidson, February 22, 1887, F.O. 69/163.

102. Minute, Davidson, October 12, 1894, Rosebery MSS 67.



main body of advice came from within the relevant office where the details and ramifications of the problem were best known. The value of external advice was that it added an authoritative tone to a chosen course of action; it was useful in public, especially Parliament, to seal an issue with the sanction of a lawyer.

A good legal adviser needed to be able, where necessary, to give objective, long-range opinions, avoiding the sheer technicality of the law, and uninfluenced by the more immediate and narrow interests and ad hoc circumstances involved.<sup>103</sup> The lawyers were expected to make out the best possible case for actions decided upon by the government or for policies about to be decided upon.<sup>104</sup> Within this framework, the legal adviser could be very important in the formulation of policy, of long-range plans of action. The usefulness of his advice depended largely on his personal qualifications and on achieving a balance between legal experience and knowledge of local facts. Davidson, for example, rated poorly in these factors, and largely failed; by contrast, Bramston and Pauncefote scored highly and were successful, useful advisers. The most satisfactory solution involved integrating legal theory with practical considerations, not through divorcing the two.

In evaluating the significance of the system of legal advice so far as concerned the development of principles of extraterritoriality one can conclude that it did finally succeed in helping to construct an adequate system of protectorate administration. The process was neither easy nor direct; indeed for a while the nature of the legal advice was quite obstructive. Nevertheless, by the end of the 1890s British administrators, through the help of their lawyers, had devised, in theory as well as in practice, a satisfactory appreciation of protection. It had three attributes. Two were basic and had been established early—the principle of exclusion wherein the protecting state had the right to exclude from the protected state political, economic, or military

103. Herbert Merillat, *Legal Advisers*, pp. 17, 19.

104. See Percy E. Corbett, *Law in Diplomacy* (Princeton, N.J.: Princeton University Press, 1959), p. 32.



influence or intervention by a third state; and the principle of responsibility wherein the protecting state assumed responsibility for the control and conduct of the external relations of the protected state. The third attribute was finally approved during the 1890s; this was intervention, wherein the protecting state in certain circumstances assumed a right to intervene in the internal affairs of the protected state.<sup>105</sup> These circumstances seemed quite flexible and were in the discretion of the protecting state.

During the 1890s British protectorates came to be treated as administrative units almost akin to colonies or to territories within the British dominion. This type of protectorate is generally described in textbooks as a "colonial protectorate," as opposed to a protected state, such as existed in Zanzibar or the Malay peninsula during the 1890s.<sup>106</sup> The concept of the "colonial protectorate" evolved partly because of mounting international pressures although it should be emphasized that these political and diplomatic factors alone do not offer a sufficient explanation. In the 1890s the Germans and French were using the protectorate device to considerable advantage. But Britain, with the largest of the European empires, found that in terms of administrative convenience their earlier concept of "protectorate" was a hindrance. Also, when compared with the practice of Germany and France, the British concept was possibly a source of jeopardy so far as the preservation and furtherance of imperial interests were concerned. So the original concept of "protectorate" as a legal term arising out of the usual situation of foreign jurisdiction was changed during the 1890s to fit the European pattern.

The change in meaning occurred in three stages. During the 1870s the meaning was loose and inexact. In 1876 Lord Carnarvon, the colonial secretary, observed that the protectorate system

105. Fawcett, *The British Commonwealth in International Law*, p. 136, discusses these three attributes.

106. Arthur B. Keith, *The Governments of the British Empire* (New York: The Macmillan Company, 1935), pp. 463, 497-508; Mark F. Lindley, *The Acquisition and Government of Backward Territory in International Law*, p. 183.

was "just coming in."<sup>107</sup> In his mind a protectorate was intermediate between a sphere of influence (which he did not define) and full sovereignty. It imposed a duty upon the protecting power to defend the local native ruler in return for the subordination of his foreign policy "and to some extent of his internal administration" to the wish of the protecting state. Carnarvon's notion of a protector's duties although vague and indefinite were, in fact, quite similar to those finally settled in the 1890s, after the concept had gone through a "refinement" in the 1880s at the hands of the legal experts. His concept of protectorate status came primarily from his knowledge of West Africa, especially the Gold Coast "protectorate." There the British had taken upon themselves the obligation to defend the protectorate against attack by the Ashantis; also, they had interfered in internal matters in a "humanizing" manner in their attempts to do away with the slave trade.<sup>108</sup>

Carnarvon's practical views on the nature of a protectorate were reversed during the 1880s when the senior legal experts were called upon to make a more exact pronouncement upon the nature of a protectorate. The Berlin Conference of 1884-85 provided a suitable occasion for the airing of legal decisions. At that time Lord Chancellor Selborne was the ultimate arbiter and he set the pattern wherein a protectorate was to be clearly differentiated from a colony. But even before the conference he had formulated objections to the ready acceptance of obligations by Britain over countries inhabited by uncivilized or semicivilized peoples. From his youth he had been opposed to European states treating those people as if they had no rights.<sup>109</sup> They needed to be protected, and Selborne seemed prepared, if necessary, to recommend the regular application of the rules of international law for their protection (almost as if the natives were members of the family of nations). So, for instance, in 1883 he opposed Britain's taking any steps to annex New Guinea unless the princi-

107. Arthur Hardinge, *The Life of Henry Howard Molyneux Herbert, Fourth Earl of Carnarvon, 1831-1890* (London: Humphrey Milford, 1925), II, 140.

108. Hardinge, *Life of Carnarvon*, II, 147.

109. Roundell Palmer, *Memorials*, IV, 103.

pal tribes had initiated or concurred in such a course of action.<sup>110</sup>

This limited sense of protectorate and of consequent rights and obligations thereunder posed administrative problems. Sir Alfred Lyall, a practical colonial administrator, very conversant with the Indian type of protectorate, voiced such difficulties in 1891.<sup>111</sup> In the past, he observed, trouble in a protectorate would go unnoticed by other powers. In 1891 such trouble could easily produce diplomatic flare-ups since the whole world was carved up and the interests of European protecting powers abutted one another in Africa and the Pacific. To solve such difficulties Lyall advocated that a new system of responsibilities be cast upon the protecting powers: "it is difficult to resist the conclusion from experience that the system of protectorates implies nothing less than the gradual assumption of all the risks and responsibilities of ever-growing sovereignty."

During the 1890s policy considerations reflecting both administrative requirements and political reasons became paramount modifying the earlier legal niceties. This was very true of Joseph Chamberlain's views as colonial secretary. He moved towards obliterating the distinction between protectorate and dominion. Drawing upon the statements of the lord chief justice in the Jameson case,<sup>112</sup> Chamberlain chose to widen the scope of the judge's remarks, making them apply not only to South Africa but also to West Africa.<sup>113</sup> So, in connection with negotiations between the British and the French to settle boundaries in the Niger basin, Chamberlain observed that since the territories administered by the Royal Niger Company were technically British protectorates the French should be told that those territories were British dominions upon which the French should not encroach.

The legal experts, in the case of Mashonaland in 1891 and of Sierre Leone in 1895, had offered official endorsement to the

110. Selborne to Gladstone, private, April 22, 1883, Gladstone MSS, B.M. Add. MSS 44298, f.44.

111. Alfred C. Lyall, "Frontiers and Protectorates," *The Nineteenth Century*, XXX (1891), 324-28.

112. *R. v. Jameson and Others*, [1896] 2 Queen's Bench, 425.

113. Memorandum, Chamberlain, February 7, 1898, Chamberlain MSS JC9/4/2B/3.

policy that a British protectorate could involve wide responsibilities on the part of Britain. In another case in 1895 the law officers backed up this wider interpretation when doubts were raised about Britain's power to control the navigation by a foreign gunboat up the Niger River through the British protectorate.<sup>114</sup> "A Protectorate, especially in uncivilized countries, involves a right in the protecting Power to exercise whatever military or naval authority may be needed for preventing foreign intrusion."

Of course, it should always be remembered that a discrepancy often existed between the theory and practice on protectorates. The man-on-the-spot, in particular, often chose to ignore the theoretical implications of protection. This was well illustrated in the mid-1880s by the British treatment of Ja Ja, King of Opobo. In July 1884, when consul Hewett was negotiating a number of treaties of protection in the Oil Rivers, Ja Ja asked for a definition of the word "protection." Hewett replied very correctly:

. . . with reference to the word "protection" as used in the proposed Treaty, . . . the Queen does not want to take your country or your markets, but at the same time is anxious no other natives should take them. She undertakes to extend her gracious favour and protection, which will leave your country still under your government. She has no wish to curb your rule, although she is anxious to see your country get up. . . .<sup>115</sup>

With these assurances as to the preservation of his power and trading rights Ja Ja went ahead with a preliminary treaty. It was his misfortune three years later to discover that the practice of a consul exercising protectorate jurisdiction extended far beyond this definition. Acting consul Johnston, of his own accord, assumed the power actually to depose Ja Ja and exile him because he opposed British interests, being primarily the desire of British traders to have a free and easy access to markets inland from Opobo. The consul quite deliberately interfered in the most drastic manner with the internal affairs of the native state, and

114. Reid, Lockwood to Kimberley, June 7, 1895, C.O. 885/14.

115. Hewett to Ja Ja, July 1, 1884 in Ja Ja to Salisbury, November 26, 1885, "Papers Relative to King Ja Ja of Opobo, and to the Opening of West African Markets to British Trade," [C. 5365], p. 29, P.P. 1888, LXXIV.



the Foreign Office, although somewhat belatedly and with some misgivings, acceded to these actions.

The change in legal theory involved two major points. The one was the exercise of jurisdiction over foreign subjects which has been discussed fully above. The second point was of a more general nature. This involved a tacit modification of the concept of sovereignty. The effect of the legal decisions of the 1890s was that Britain was acquiring certain sovereign rights in a protectorate. This was a revision of Austin's concept of the indivisibility of sovereignty although usually the problem and the solution were not directly stated in those terms. Instead the lawyers approved easy means whereby Britain could acquire certain jurisdictional and administrative rights from uncivilized or semi-civilized peoples. This put at rest the problem that since the 1860s had been plaguing colonial administrators about the manner of acquiring jurisdiction from uncivilized people. In the 1860s and 1870s the existence of such communities with no recognizable government was seen as an obstacle to the acquisition of jurisdiction. The Pacific Islanders Protection Act of 1875 and the Foreign Jurisdiction Act of 1878 had provided a partial answer to this problem. The law officers' decisions of 1895 relating to the Gold Coast and Sierra Leone provided the full answer wherein very full powers could be assumed over uncivilized people. As a precedent and justification for this increase in Britain's powers and responsibilities as a protector the lawyers could fall back upon the example of the Gold Coast colony where since the 1840s jurisdiction and authority had in practice been extended gradually over the adjoining protected areas. This exceptional case came to be the norm.

Not all legal opinion agreed with the change in theory. One of the main concerns of Lord Selborne in the 1880s had been to protect the government from the necessity of assuming too many costly and difficult duties in a protectorate. Lord Halsbury, the lord chancellor, echoed similar sentiments in 1898, reminding the Colonial Office that "the comparatively modern invention of a protected area has been apparently agreed upon by various countries to avoid the responsibilities which necessarily attach to



sovereignty and dominion.”<sup>116</sup> He was anxious to ensure that Chamberlain fully understood the wide range of responsibilities that the government would have to assume if in truth protectorates were treated as being equivalent to dominion.

This inconstancy in legal theory is not surprising since the concept of protectorate was quite new, at least, insofar as concerned the African and Pacific cases where the people and territory placed under protection were considered to be barbarous or at the most semicivilized savages. On the whole neither the lord chancellors, nor the law officers, nor the legal advisers within the government departments were particularly well-versed in matters of international law; an exception had been the queen’s advocate but this post had been abolished in 1872. Consequently, apart from their own precedents, the legal advisers had to rely upon the writings of jurists who specialized in international law.

William Hall, one of the leading jurists in England, made no mention of the African or Pacific type of protection in his book, *International Law*, published in 1880.<sup>117</sup> This book became one of the standard texts in the field. A similar “omission” could be found in any textbook on the topic—for example, the text of a former queen’s advocate, Travers Twiss, *The Law of Nations*, in its 1884 edition.<sup>118</sup> One might also note that in two books dealing specifically with extraterritorial or foreign jurisdiction no mention was made of the African or Pacific situation; one was published in 1887 by Charles Tarring (who had been a judge exercising such jurisdiction in the Levant) and the other in 1892 by Francis Piggott (who had been a legal adviser to the Japanese cabinet).<sup>119</sup> An early text, published in 1859 by George Lewis, *On Foreign Jurisdiction and the Extradition of Criminals*, ad-

116. Memorandum, Halsbury, February 11, 1898, Chamberlain MSS JC9/4/2B/3.

117. William E. Hall, *A Treatise on International Law* (Oxford: Clarendon Press, 1880). This book went into eight editions.

118. Travers Twiss, *The Law of Nations Considered as Independent Political Communities* (new ed., revised and enlarged; Oxford: Clarendon Press, 1884).

119. Charles J. Tarring, *British Consular Jurisdiction in the East* (London: Stevens and Haynes, 1887); Francis T. Piggott, *Extraterritoriality: The Law Relating to Consular Jurisdiction and to Residence in Oriental Countries* (London: William Clowes and Sons, Limited, 1892).

verted to the position that had arisen in the Gold Coast during the 1840s wherein Britain had taken jurisdiction over some natives.<sup>120</sup> But he drew no conclusions from this situation; rather, he treated it as a unique variation on the normal pattern of foreign jurisdiction. Prior to the 1890s, English jurists failed to realize that a special situation was developing in the type of protectorate being established in Africa and the Pacific.

In his text published in 1888 Henry Maine briefly alluded to the German type of protectorate in support of his argument against the Austinian idea of the indivisibility of sovereignty.<sup>121</sup> This inspired Jenkyns in his debate with Wright concerning the draft of the new consolidated Foreign Jurisdiction Bill. But the first major break came in 1890 with Hall's third edition of *International Law*.<sup>122</sup> He added a special section on protectorates over uncivilized and semicivilized peoples wherein he prescribed that the protecting state must have rights over foreign subjects. He noted that German protectorates were treated like areas directly administered by the crown. These observations seem to have guided Bramston in his memorandum on South Africa in 1891.

Hall took the initiative and other lawyers began to follow—first Bramston, then the law officers, and legal advisers in the Foreign Office. In 1894 Hall commented that as a result of recent developments by Britain in its African and Pacific protectorates Britain was assimilating its position to that of the European powers.<sup>123</sup> This point was confirmed in 1902 by Jenkyns.<sup>124</sup> He noted that Britain was gradually increasing its assumption of internal sovereignty over protectorates; this made it difficult to draw a line between a protectorate and a British possession. By the turn of the century, the jurists, the legal advisers, and the colonial administrators had come to an agreement upon the nature

120. George C. Lewis, *On Foreign Jurisdiction and the Extradition of Criminals* (London: John W. Parker and Son, 1859), p. 17.

121. Henry J. S. Maine, *International Law* (London: John Murray, 1888), p. 58.

122. William E. Hall, *A Treatise on International Law* (3rd ed.; Oxford: Clarendon Press, 1890), pp. 127–29.

123. William E. Hall, *A Treatise on the Foreign Powers and Jurisdiction of the British Crown* (Oxford: Clarendon Press, 1894), p. 218.

124. Henry Jenkyns, *British Rule and Jurisdiction Beyond the Seas* (Oxford: Clarendon Press, 1902), pp. 192–93.

of a protectorate and upon the rights and duties that a protecting state could exercise.

At the same time the senior legal advisers had not conceded that a protectorate was in fact part of Her Majesty's dominions; it was close to being a colony but not quite so. Although Britain might exercise very wide power and jurisdiction in a protectorate territorial sovereignty was not thereby acquired.<sup>125</sup> Although there is no fully comprehensive definition of "Her Majesty's dominions," Lord Justice Kennedy supplied in 1910 an intelligible meaning: "regions over and in which His Majesty has and exercises the whole collection or bundle of separable powers which . . . constitute territorial sovereignty."<sup>126</sup> This situation had not yet been reached in a protectorate.

The position with regard to a sphere of influence was not so clear. This concept was not so frequently used as protectorate and such references as were made were quite vague.<sup>127</sup> Administrators in London did not consider it essential in practice to distinguish between a sphere of influence and a protectorate; and in theory they were not aware that such a distinction could be made. But in general terms a protectorate suggested recognition by more than one foreign power and it involved a greater degree of control (although the extent of the differentiation was not exact).<sup>128</sup>

It could be argued that in a sense the concept of sphere of influence was involved in the Pacific Islanders Protection Act of 1875, section 6, wherein Her Majesty took jurisdiction over British subjects within any island which was not within the jurisdiction of any civilized power. But during the 1880s and 1890s the concept became more clearly identifiable in the series of agreements, generally bilateral, between European powers as they arbitrarily carved up "interest" zones in Africa—for ex-

125. *R. v. Earl of Crewe, ex parte Sekgome*, [1910] 2 King's Bench, 603-04.

126. *R. v. Earl of Crewe*, pp. 622-23.

127. William E. Hall, *Foreign Powers*, p. 228; Claire Palley, *The Constitutional History and Law of Southern Rhodesia*, pp. 9-15; Mark Lindley, *Acquisition*, chap. xxiv, writing in the 1920s, formulates four varieties of a sphere of influence.

128. Geddes W. Rutherford, "Spheres of Influence: An Aspect of Semi-Sovereignty," *American Journal of International Law*, XX (1926), 317-19.

ample, the agreement made between Britain and Germany in April–June 1885 concerning the Guinea coast.

Lord Salisbury had no hesitation in treating spheres of influence and protectorates as the same. This was evident, for example, in his attitude in the early 1890s towards the area of British influence along the East African coast where the territory concerned was treated like any foreign jurisdiction area. Harcourt condemned Salisbury for this “great blunder” but could effect no change in policy.<sup>129</sup> The law officers, in 1893, took an approach similar to Salisbury’s.<sup>130</sup> They saw no difference between the two concepts except in manner of creation. A sphere of influence rested entirely upon treaty arrangements between Britain and some foreign power outside the sphere. But, as to the powers, obligations, or duties that attached to a sphere, they were practically the same as in a protectorate.

Two years later Lord Chancellor Herschell took a more limited view on the nature of a sphere of influence. The occasion was the Anglo-French discussions about Africa (particularly the Nile and Niger valleys). He described the sphere of influence as a very modern creation with no recognized position and incidents in international law.

Our sphere in that part of Africa rests on an agreement which I think amounts to no more than this that the Powers *who are parties to it* will not interfere with the recognised sphere of influence of the other. But it is difficult to see what effect such agreement can have as regards any Power not a party to it and who has not recognised it, or what rights it can give against such a Power.<sup>131</sup>

The lord chancellor’s observations were correct at law but during the 1890s no serious attempt was made by the British government to draw any practical distinction between a sphere of influence and a protectorate.

Considered in the overall framework of imperial policy-planning the evolution of this concept of jurisdiction in protectorates (and spheres of influence) can be seen as one of the most signifi-

129. Harcourt to Rosebery, October 23, 1893, Rosebery MSS 26.

130. Russell, Rigby to Rosebery, June 8, 1893, F.O. 572/28.

131. Herschell to Rosebery, April 28, 1895, confidential, Rosebery MSS 71.



cant developments of the late nineteenth century. It enabled British influence to spread quickly over wide reaches of Africa and the Pacific. Furthermore the need to acquire jurisdiction and to exercise it efficiently can be seen as a motive for imperial expansion, when informal, as opposed to formal, empire is being considered. The most commonly given motives for imperial expansion are economic and strategic (involving political and diplomatic factors). But it is also possible to supply jurisdictional problems as a factor. Repeatedly in the Pacific and in Africa situations of lawlessness and disorder created the need for effective British intervention—in the form of the assumption of some amount of jurisdiction and control. Often the need was to protect British lives and property against natives; but, also, on occasions the need was to protect natives against lawless British subjects. Although the words “peace, order and good government” often obtained primarily rhetorical significance, there were occasions when pressures from the particular locality or from interests at home obliged the British government to take positive steps to put some content into the words. Sometimes native authority would prove to be so inadequate and conditions in uncivilized areas would become so disorderly that Britain would intervene to protect at least its own subjects. On other occasions, because of growing British contact and influence, the British government would obtain jurisdiction, again over its own. And just as the “contiguous area” theory can explain formal territorial expansion so an adaptation of this theory can be made to explain jurisdictional imperialism; one kind of jurisdiction (over British subjects) leads almost automatically to other jurisdictional claims, over foreigners, over natives, over general administration unless met by some fixed and superior barrier. So an informal empire, a jurisdictional empire, is built up.

The key to explaining the development of this jurisdictional empire lies in the source of legal advice. As indicated above legal theory during the mid-century period started off raw and uncertain; it slowly developed, but in an unsatisfactory direction. Finally in the 1890s a more suitable direction was adopted. In explaining these developments two types of legal



adviser need to be differentiated. One group was the senior advisers to the government, meaning primarily the lord chancellor and the law officers of the crown. The second group comprised legally-trained administrators within the Colonial Office and the Foreign Office, along with miscellaneous other lawyers. Mid-century the senior lawyers were led by the departmental lawyers and the direction chosen by the latter was fairly loose and open. They were concerned, for reasons of administrative efficiency, to create a flexible system of foreign jurisdiction; they could see no advantage in a hard and fast system of protectorate administration. After 1879 the senior legal advisers began to take over and decide jurisdictional problems in accordance with their own concept of the law. They were no longer content to be led by the lawyers within the departments. So, during the 1880s a body of definite legal theory on the nature of a protectorate emerged and it was almost wholly legal theory, unaffected by practical considerations. During that period the departmental lawyers like Bramston, Herbert, and Pauncefoot backed down in the face of the developing body of legal authority. To some extent they began to doubt their earlier notions on the legal position concerning extraterritoriality. Certainly their ideas on this were not clearly settled and they did not feel sufficiently skilled to challenge the authority of the lord chancellors or the law officers. At the same time during that decade the departmental lawyers began to realize that if the strict legal position became definitely accepted into the British system of administration in areas of informal empire grave problems of control would face advisers and administrators, both in London and on the spot. So within the departments an anxiety was developing in the second half of the decade (at the time when legal theory was becoming quite hardened). Some greater flexibility in legal theory seemed desirable. Two external legal advisers, Jenkyns and Ilbert, initiated the challenge. Unlike the lawyers in the Colonial Office and the Foreign Office whose ideas on the actual legal theory underlying protection had not yet solidified these two lawyers directly contradicted the authority of the senior lawyers of the government, and did so with an equally impressive array of legal authority.

By 1891 the Colonial Office through advisers like Bramston and Fairfield felt sufficiently qualified to begin dictating again to the law officers on the legal position surrounding protectorates. This was almost a return to the mid-century position. By the late 1890s the Foreign Office also was taking the same line, using a more flexible approach on the nature of a protectorate.

It might appear strange that the senior lawyers of the government should back down after 1891 on their previous stand. It was, in fact, the same law officers—Webster and Clarke—who in the later 1880s were taking a strict legal line on the limited scope of protection and who in 1891 agreed to a broader, more expansive interpretation. The most satisfactory explanation of this *volte-face* lies in an examination of the degree of understanding that the senior lawyers had on problems of foreign jurisdiction. As already indicated they were basically not experts in this matter. This was obvious mid-century. During the 1880s a body of precedents was built up, starting with a law officers' decision in 1879. In typical legal fashion precedent was built upon precedent and the body of legal theory began to harden. It received a great boost from the work of Lord Selborne who for his own humanitarian reasons argued skilfully for a limited scope of protection. In this manner he hoped native rights and life generally would be least interfered with by Europeans; he also hoped to keep government responsibility at a minimum level. The theory that developed did not take into account practical considerations, such as problems of administration that would arise if, indeed, a jurisdiction was thereby established which was insufficient to handle problems of lawlessness and disorder.

Accordingly, when a contradictory set of legal arguments was produced it became possible for a real challenge to be made to the senior legal advisers. Jenkyns and Ilbert began this movement. When followed up by the very detailed analysis of the nature of protection made by Bramston fissures began to appear in the earlier legal theory. The senior legal advisers were only too aware that they were fallible authorities and not very expert in matters of extritoriality. Furthermore, Lord Knutsford heading the Colonial Office, was backing the stand taken by Bramston.

So, the law officers were willing to adopt an alternative, authoritative legal approach. In any case, the reversal of the earlier legal theory was highly desirable since it reflected too much an approach based solely upon legal theory without regard for actual consequences. The eventual triumph of the approach of the legally-trained administrators in the Colonial Office and the Foreign Office was fortunate since it marked a blending of legal theory with administrative requirements. Pure law was tempered by practical necessity.

One obvious factor underlying the change in legal theory is the assertion that political pressure was brought to bear to effect a more suitable approach to the administration of protectorates. The general argument is well known that imperialistic interest heightened in Britain in the 1880s and 1890s—the period of the “scramble.” Certainly in the 1890s British governments were fully aware of the international pressures and diplomatic moves wherein the European nations were spreading as widely as possible their control or influence over the whole globe. Then, with the advent of Joseph Chamberlain to the post of colonial secretary in 1895, an active imperialism was put into effect to ensure British supremacy. Quite clearly one has to allow that political and diplomatic pressures existed and influenced advisers in the Colonial Office and the Foreign Office to take an imperialistic line. Possibly, also, these pressures were brought to bear on senior legal advisers like the lord chancellor or the law officers, but no records exist to prove this conclusively. In any case, this is not the full explanation.

It is quite clear that at least two other factors were pertinent influences on the minds of those administrators in the Colonial Office and the Foreign Office who dealt with problems of protectorates or foreign jurisdiction. They were forever concerned with the quest for administrative efficiency. And, if a situation arose which hampered their administrative efforts, they obviously sought to have the matter rectified. Mid-century foreign jurisdiction and protection problems could be handled quite smoothly because the administrators were allowed a flexible approach. Legal theory had not hardened in an obstructive manner. As the

1880s progressed this situation changed to the disadvantage of the administrators and increasingly they complained about jurisdictional problems caused by an unsatisfactory legal theory. The administrators began to work for a reversal of this theory, to return to the greater freedom that existed earlier. And they achieved success in this during the 1890s. These administrative reasons have a validity of their own quite irrespective of the changing political and diplomatic scene.

There exists a certain consistency throughout the whole of this period in the approach of the legally-trained administrators in the Colonial Office and the Foreign Office engaged on problems of foreign jurisdiction. This was that areas of foreign jurisdiction or protection should be administered as effectively and efficiently as possible. Protectorates had to be made workable without creating too many administrative problems, either locally or in London. If legal theory interfered in this respect it needed to be changed. Likewise, individuals were not allowed to interfere with the efficient working of the system. A classic example of this concerned British treatment of King Ja Ja. The king took his treaty of protection as offering him individual rights which he could exercise as he pleased. To the British, however, his kingdom of Opobo was only part of the larger protectorate of the Niger Coast. This protectorate was an amalgam of various protection treaties signed with local kings and chieftains; no one treaty creating a protectorate over the whole area had ever been signed, since there was no single authority competent to act in respect thereof. Nevertheless, the British, mainly for reasons of administrative efficiency, went ahead with the creation of a single territorial unit. In British eyes the administration of the whole area, and not the stipulated rights of an individual segment of the area, had first consideration. So Lord Rosebery at the Foreign Office informed Ja Ja that regardless of guarantees in his treaty no single ruler would be allowed to oppose the overall scheme of development for the territories on the Guinea coast under British protection. In other words, the progress of the whole region as seen through British eyes came before the interests of any one area. Rosebery painted British aims as being for



the promotion of the welfare of the natives of all those territories, taken as a whole, by insuring the peaceful development of trade, and by facilitating their intercourse with Europeans.

It is not to be permitted that any Chief who may happen to occupy a territory on the coast should obstruct this policy in order to benefit himself.<sup>132</sup>

Even though Ja Ja thought he had in the treaty of protection assured to himself certain trading rights the British government made it clear that its policy was governed by larger concerns—the interests of European traders, of Ja Ja's people, and of neighboring tribes. Consequently, Ja Ja's interest had to be subordinated to the overall British plan of the whole area of the Niger districts. This comprehensive approach towards a whole area for administrative reasons was adopted elsewhere; for example, the East Africa Protectorate was welded out of a number of individual treaties of protection.

Arising along with this concern for efficiency in the administration of protectorates but not associated causally was the factor of a genuine imperialistic concern on the part of the legally-trained administrators in the Colonial Office and the Foreign Office. Particularly in the case of Bramston, Herbert, and Pauncefote it seems possible to assert that throughout the whole period—the 1870s, 1880s, and 1890s (so long as they were in office)—these three were imperialists at heart. They did not necessarily urge annexation but they were fairly consistent advocates of indirect expansion. For most of the period they were ready to use methods of informal empire—to further British influence, to develop the system of exterritoriality, to improve the administration of protectorates. Only for a while and on some occasions during the 1880s did they not carry further the policy of spreading British jurisdiction and authority by indirect means. During that respite they abided by the restrictive notions of the senior legal advisers. But once their ideas had become clarified and when administrative problems arose demanding a further development of indirect rule the Colonial Office and the Foreign

<sup>132</sup>. Rosebery to Ja Ja, June 16, 1886, "Papers Relative to King Ja Ja . . .," [C. 5365], p. 42, *P.P.* 1888, LXXIV.

Office pursued the earlier trend of expanding the principles of extritoriality. By the time of Bramston's retirement in 1897 the pattern was well-established.

Apart from the administrative factor the second explanation that must be added to the regular story of imperialism as defined in political, diplomatic, and economic terms is the factor of legalism. British administrators of the nineteenth century could not escape this factor; indeed they usually did not want to but tried whenever possible to adhere to legal forms. The formula of "peace, order and good government" was ever present; they were always concerned by problems of lawlessness and disorder; they were certain of the superiority of the British system of justice and its eventual acceptance in the primitive areas of the world. British administrators lived with these legal considerations of imperialism. But most recent writers on British imperialism have overlooked the use of legal concepts and forms in the creation of an empire. One can certainly point, for example, to the pull of trade in the Niger basin as being a motive stimulating the imperialists. But other imperialists were activated by the need to establish an effective jurisdiction there. Some wanted to do this to protect the British entrants; others wanted to protect the native inhabitants. But most thought the area could not be left alone. Some influence, some jurisdiction was desirable. In both Africa and the Pacific, throughout the nineteenth century, the establishment of some form of jurisdiction short of annexation was an ever-present phenomenon. And the kind of jurisdiction established was very much a creation of legislation and regulation. It was the handwork of lawyers and jurists as well as of politicians. So the legal content cannot be ignored.

The factor of legalism should not be surprising since a number of the senior imperialist officials were trained lawyers. Also, it should not be surprising since Europe prided itself on its high stage of civilization as arising partly from the development of a refined system of justice. The respect of British administrators for the factor of legalism was partly rooted in their belief in the superiority of British justice and legal institutions over its Euro-

pean counterparts and certainly over native systems. Imbued with this spirit they built an empire. The legalism took two forms. One was in ensuring the provision of a duly constituted power and authority; but it also referred to an empire which was underpinned to the system of British law and to the assumption that in the course of time the obvious benefits of the British system would come to convert the native populations.

It was probably inevitable as the nineteenth century progressed that a clash of cultures would occur between the civilized British and the savage, primitive peoples in Africa and the Pacific. It seemed obvious that through the contact of the two cultures conditions of lawlessness and anarchy would arise unless sufficient controlling authority existed to regulate these conditions. And to the British it seemed quite inevitable that their culture would supply the answer and win in the clash. Mid-century the contact between the two groups was still minimal and the clash restricted. By the end of the century contact was widespread and on all fronts. And the British system was seen to be predominating. This success it was able to achieve fairly easily—through indirect means, through spreading a net of foreign jurisdiction over those unclaimed areas where British contact was growing. On most occasions it was not necessary for the British to assert themselves directly, through annexation.

The British Empire in the later part of the nineteenth century exemplified three aspects of jurisdictional imperialism. Firstly the empire arose partly because of the need to establish a sufficient jurisdiction in areas not formally part of the empire. Foreign jurisdiction legislation and the concept of the protectorate were the main avenues through which this need was satisfied. Secondly there was a need to administer such jurisdiction efficiently and effectively. This led to significant developments in the theory of foreign jurisdiction and protection so that eventually protection was becoming almost akin to annexation. Thirdly there was the underlying intellectual factor of legalism. The British advocated respect for the rule of law, they talked of the need for peace and the establishment of conditions of law and order, and they believed in the advantages of their own legal system as a

model of civilization. It may not be presumptuous to suggest that the administrators in Whitehall created in the late nineteenth century a paper empire, one of legal jurisdiction, drawn up out of Acts of Parliament and Orders in Council. Yet this paper empire also had teeth which allowed British officials sufficient authority to ensure that their wishes and policies were fulfilled.



## Appendix

This appendix provides a biographical synopsis of the more outstanding legal advisors mentioned in this book. The list includes lord chancellors, law officers of the crown, legally qualified advisers within the Colonial Office and the Foreign Office, international law jurists, and a miscellaneous group of legally trained persons associated with colonial and protectorate problems.

BAGGALLAY, SIR RICHARD (1816-88), son of merchant, graduated from Cambridge University; admitted to Lincoln's Inn, 1843, and appointed queen's counsel, 1861; elected Conservative member of Parliament, 1865, appointed solicitor-general, 1868 and 1874, attorney-general, 1874, and lord justice of appeal, 1875 (*The Dictionary of National Biography* . . . 1900, edited by Leslie Stephen and Sidney Lee, 22 vols., London: Oxford University Press, 1921-22, hereafter referred to as *D.N.B.*).

BERGNE, SIR JOHN HENRY GIBBS (1842-1908), graduated from London University; entered Foreign Office as clerk, 1861, appointed superintendent of treaty department, 1881, and superintendent of commercial department and examiner of treaties, 1894 (*D.N.B.*, 1901-11).

BRAMSTON, SIR JOHN (1832-1921), son of politician, graduated from Winchester and Oxford University and admitted to Middle Temple, 1857; went to Queensland, 1859, appointed to the Legislative Council, 1863-69, and to Executive Council, 1863-66; appointed attorney-general, 1870-73, and elected to Legislative Assembly, 1871; went to Hong Kong where he was attorney-general, 1874-76; returned to England where he was appointed assistant under-secretary in the Colonial Office, 1876 (until 1897). He was a competent, efficient administrator who gave a lifetime of service to colonial problems (*Colonial Office List*, 1898, London: Waterlow & Sons Limited, 1898; *Who Was Who*, 1916-28, London: A. & C. Black, 1929).

BRYCE, JAMES, Viscount Bryce (1838-1922), son of schoolmaster-geologist, graduated from Glasgow and Oxford universities, and admitted to Lincoln's Inn, 1867 (after studying law at Heidelberg); taught at Owens College, 1868-70, and appointed professor of civil law at Oxford, 1870; elected Liberal member of Parliament, 1880, served as under-secretary in Foreign Office, 1886, and subsequently

held ministerial posts and appointed ambassador to Washington, 1907-13 (*D.N.B.*, 1922-1930).

CAIRNS, HUGH MCCALMONT, first Earl Cairns (1819-85), son of Irish army captain, graduated from Trinity College, Dublin, admitted to Middle Temple, 1844, and transferred to Lincoln's Inn; elected Conservative member of Parliament, 1852; appointed queen's counsel, 1856; appointed solicitor-general, 1858, attorney-general, 1866, and lord justice of appeal the same year; Disraeli appointed him lord chancellor, 1868 and 1874. He was a very intelligent and sound lawyer; James Bryce described him as the greatest judge of the Victorian epoch. Also, he was a most effective leader of the Conservatives in the House of Lords; few politicians could match his intellect. During the 1870s and early 1880s he was one of the mainstays of the Conservative party (*D.N.B.*; James B. Atlay, *The Victorian Chancellors*, 2 vols., London: Smith, Elder & Co., 1908; Roundell Palmer, *Memorials*, 4 vols., London: Macmillan and Co., 1896-98; James Bryce, *Studies in Contemporary Biography*, London: Macmillan and Co. Ltd., 1903; Cairns MSS).

CLARKE, SIR EDWARD GEORGE (1841-1931), son of silversmith, helped in father's shop and went to evening classes; appointed as clerk in India Office, 1859, but one year later began legal studies and admitted to Lincoln's Inn, 1864; elected as Conservative member of Parliament, 1880; appointed solicitor-general, 1886, but declined the same post in 1895; appointed privy councillor, 1908. He wrote a book on extradition, 1867, but was not a particularly strong lawyer. He was a good speaker in the House of Commons and was a keen participant in political debates (*D.N.B.*, 1931-40; Edward G. Clarke, *The Story of My Life*, London: John Murray, 1918; Derek Walker-Smith and Edward Clarke, *The Life of Sir Edward Clarke*, London: Thornton Butterworth Ltd., 1939).

COLERIDGE, JOHN DUKE, first Baron Coleridge (1820-1894), son of judge, graduated from Eton and Oxford University, admitted to Middle Temple, 1846, and appointed queen's counsel, 1861; elected Liberal member of Parliament, 1865; appointed solicitor-general, 1868, attorney-general, 1871, chief justice of Common Pleas, 1873, and lord chief justice, 1880. Although an eloquent speaker, he did not enjoy political life (*D.N.B.*; Ernest H. Coleridge, *Life and Correspondence of John Duke, Lord Coleridge, Lord Chief Justice of England*, 2 vols., London: William Heinemann, 1904; Gladstone MSS).

COX, HUGH BERTRAM, graduated from Westminster School and Oxford University, called to Bar, 1885; assisted Webster, when attorney-general, in parliamentary and official work, 1886-97, and appointed

- junior counsel to the Treasury, 1892, and legal assistant under-secretary in Colonial Office, 1897 (*Colonial Office List*, 1900, London: Waterlow, 1900).
- DAVEY, HORACE, Baron (1833-1907), graduated from Oxford University and admitted to Lincoln's Inn, 1861; appointed queen's counsel, 1875; elected Liberal member of Parliament, 1880, and appointed solicitor-general, 1886; knew foreign law systems; elevated to Bench, 1893 (*D.N.B.*, 1901-11).
- DAVIDSON, WILLIAM EDWARD, graduated from Oxford University and admitted to Inner Temple, 1879; assisted successive law officers in their official work, 1881-86 (and assisted Board of Trade in legal matters); became private secretary to lord chancellor, 1886, and appointed legal adviser to Foreign Office in the same year, retiring 1918 (*Foreign Office List*, 1918, London, 1918).
- DEANE, SIR JAMES PARKER (1812-1902), graduated from Winchester and Oxford University, admitted to Inner Temple, 1841; appointed queen's counsel, 1858, and showed great interest in Admiralty matters; appointed legal adviser to Foreign Office, 1872-86, but this was not an official position within the office (*D.N.B.*, 1901-11).
- FAIRFIELD, EDWARD DENNY (1845-97), son of army major, graduated from Harrow school and entered Colonial Office, 1866; admitted to Inner Temple, 1872; appointed assistant under-secretary, 1892, and principal assistant under-secretary, 1897 (Frederic Boase, *Modern English Biography . . . Interesting Matter*, 6 vols., Truro: Nether-ton and Worth, 1892-1921).
- GIFFARD, HARDINGE STANLEY, first Earl of Halsbury (1823-1921), son of newspaper editor, graduated from Oxford University, admitted to Inner Temple, 1850, and appointed queen's counsel, 1865; appointed solicitor-general, 1875, and elected Conservative member of Parliament, 1877; held office of lord chancellor, 1885, 1886, and 1895 (until 1905). His legal opinions tended to reflect practical considerations; Salisbury highly appreciated his services (*D.N.B.*, 1912-21; Richard F. V. Heuston, *The Lives of the Lord Chancellors, 1885-1940*, Oxford: Clarendon Press, 1964; Alice W. Fox, *The Earl of Halsbury, Lord High Chancellor, 1823-1921*, London: Chapman & Hall, 1929; Halsbury MSS).
- GORST, SIR JOHN ELDON (1835-1916), son of landed father, graduated from Preston grammar school and Cambridge University, went to New Zealand, 1860, and entered politics there; admitted to Inner Temple, 1865; elected Conservative member of Parliament, 1866, involved in party reorganization, 1868; appointed queen's counsel, 1875, solicitor-general, 1885, and subsequently held cabinet posts (*D.N.B.*, 1912-21).

GRAY, SIR ALBERT (1850-1928), graduated from Rugby and joined the Ceylon Civil Service, 1871; admitted to Inner Temple, 1879, appointed counsel to chairman of committees in House of Lords 1896 (*Who Was Who*, 1916-28, London: A. & C. Black, 1929).

HARCOURT, SIR WILLIAM GEORGE GRANVILLE VENABLES VERNON (1827-1904), son of canon, graduated from Cambridge University, and admitted to Inner Temple, 1854; privately studied international law, wrote "Historicus" letters to the *Times*, 1861-1876, on points of international law, and appointed Whewell Professor of International Law at Cambridge, 1869; elected Liberal member of Parliament, 1868, appointed solicitor-general, 1873, and subsequently held cabinet posts. He showed great parliamentary ability and, also, was acknowledged throughout Europe as a leading international lawyer (*D.N.B.*, 1901-11; Alfred G. Gardiner, *The Life of Sir William Harcourt*, 2 vols., London: Constable & Company Ltd., 1923; Gladstone MSS).

HERBERT, SIR ROBERT GEORGE WYNDHAM (1831-1905), grandson of first Earl of Carnarvon, graduated from Eton and Oxford University; served as private secretary to Gladstone, 1855, and admitted to Inner Temple, 1858; went to Queensland where he was elected colonial secretary, 1859-65 (with one short break); entered Colonial Office, 1870, and appointed permanent under-secretary, 1871-92. He was an ideal civil servant (*D.N.B.*, 1901-11).

HERSCHELL, FARRAR, first Baron Herschell (1837-99), son of minister, graduated from University of London, and admitted to Lincoln's Inn, 1860; elected Liberal member of Parliament, 1874, appointed solicitor-general, 1880, and lord chancellor, 1886, 1892. James and Herschell, as law officers, proved to be a very sound and efficient team, Herschell being the greater legal authority (*D.N.B.*, *Supplement*; Gladstone MSS).

HERTSLET, SIR EDWARD (1824-1902), son of librarian of Foreign Office, entered Foreign Office, 1840, appointed sub-librarian, 1855, and librarian, 1857-96. He was praised as being a "pivot of Foreign Office work" (*D.N.B.*, 1901-11).

HOLKER, SIR JOHN (1828-83), son of manufacturer; started as solicitor, admitted to Gray's Inn, 1854, and appointed queen's counsel, 1866; elected Conservative member of Parliament, 1872, appointed solicitor-general, 1874 and attorney-general, 1875; described as a successful law officer, showing rough good sense rather than great technical knowledge (*D.N.B.*; Selborne MSS 1873, ff.56-59).

HOLLAND, HENRY THURSTAN, first Viscount Knutsford (1825-1914), son of physician (and baronet), graduated from Harrow and Cambridge University, and admitted to Inner Temple, 1849; involved



in parliamentary legislative counselling during 1850s; appointed legal adviser to Colonial Office, 1867, assistant under-secretary, 1870-74; elected Conservative member of Parliament, 1874, and held ministerial posts under Lord Salisbury, 1885, 1886, being appointed colonial secretary, 1888-92 (*D.N.B.*, 1912-21).

ILBERT, SIR COURTENAY PEREGRINE (1841-1924), son of clergyman, graduated from Marlborough and Oxford University, and admitted to Lincoln's Inn, 1869; assisted parliamentary counsel's department although no official position; appointed legal member of Council in India, 1882, assistant to parliamentary counsel, 1886, and clerk of House of Commons, 1902 (*D.N.B.*, 1922-30; Frederick Pollock, "Sir Courtenay Peregrine Ilbert, G.C.B., 1841-1924," *Proceedings of the British Academy*, XI, 1924-25).

JAMES, HENRY, first Lord James of Hereford (1828-1911), son of surgeon, admitted to Middle Temple, 1852; elected Liberal member of Parliament, 1869; appointed solicitor-general, 1873, attorney-general four months later and again 1880-85; helped form the Liberal Unionists (and declined lord chancellorship), 1886; accepted ministerial post, 1895. He enjoyed the political scene and, as a law officer, was not too technically legal, thereby serving Parliament well (*D.N.B.*, 1901-11; George R. Askwith, *Lord James of Hereford*, London: Ernest Benn, 1930; Gladstone MSS; Chamberlain MSS).

JENKYNs, SIR HENRY (1838-99), son of canon, graduated from Eton and Oxford University, and admitted to Lincoln's Inn, 1863; appointed assistant parliamentary counsel to the Treasury, 1869, and parliamentary counsel, 1886-99 (Frederic Boase, *Biography, Supplement*; also see preface by Sir Courtenay Ilbert to Jenkyns's *British Rule and Jurisdiction Beyond the Seas*, Oxford: Clarendon Press, 1902, published posthumously).

KARSLAKE, SIR JOHN BURGESS (1821-81), son of solicitor, graduated from Harrow school and admitted to Middle Temple, 1846; appointed solicitor-general, 1866, then elected Conservative member of Parliament, 1867, and appointed attorney-general, 1867 and 1874 (*D.N.B.*).

LOCKWOOD, SIR FRANK (1846-97), son of stone-quarrier, graduated from Manchester grammar school and Cambridge University, and admitted to Lincoln's Inn, 1872; appointed queen's counsel, 1882, elected Liberal member of Parliament, 1885, and appointed solicitor-general, 1894. He was a humorous man and sketched well but was not a great lawyer (*D.N.B.*, *Supplement*; Gilchrist Alexander, *The Temple of the Nineties*, London: W. Hodge & Co., 1938; Augustine Birrell, *Sir Frank Lockwood: A Biographical Sketch*, London: Smith, Elder, & Co., 1898).

- MALCOLM, WILLIAM ROLLE, graduated from Eton and Oxford University, and admitted to Lincoln's Inn, 1865; took up government positions, and appointed assistant secretary to Board of Trade, 1870, and assistant under-secretary in Colonial Office, 1874-78 (*Colonial Office List*, 1879, London: Waterlow, 1879).
- MERCER, SIR WILLIAM HEPWORTH (1855-1932), graduated from Oxford University and served in Colonial Office, 1879-1921; admitted to Inner Temple, 1886 (*Colonial Office List*, 1921, London: Waterlow, 1921).
- MUIR-MACKENZIE, KENNETH AUGUSTUS, first Baron Muir-Mackenzie (1845-1930), son of baronet, graduated from Charterhouse and Oxford University and admitted to Lincoln's Inn, 1878; appointed permanent principal secretary to lord chancellor, 1880-1915 (*Who Was Who*, 1929-40, London: A. & C. Black, 1941).
- PALMER, ROUNDELL, first Earl of Selborne (1812-95), son of minister, graduated from Winchester and Oxford University and admitted to Lincoln's Inn, 1837; elected as a Peelite member of Parliament, 1847; appointed queen's counsel, 1849, solicitor-general, 1861, attorney-general, 1863, lord chancellor, 1872 and 1880; became a Liberal Unionist, 1886, and refused lord chancellorship. He was a very pious and humanitarian person, concerned about the welfare of natives. Some of his opinions as law officer and lord chancellor were criticized for being too legalistic (*D.N.B.*; Roundell Palmer, *Memorials*, 4 vols., London: Macmillan and Co., 1896-98; Selborne MSS; Gladstone MSS).
- PAUNCEFOTE, JULIAN, first Baron Pauncefote (1828-1902), son of landed person, admitted to Inner Temple, 1852, and served as private secretary to Molesworth, colonial secretary, 1855; went to Hong Kong, 1863, and was appointed attorney-general, 1866; appointed chief justice of Leeward Islands, 1874; appointed legal assistant under-secretary in Colonial Office, 1874, took up similar post in Foreign Office, 1876, and appointed permanent under-secretary of Foreign Office, 1882; appointed envoy extraordinary, 1889, and ambassador to the United States, 1893. He had a sound understanding of the law, along with a practical sense of administration (*D.N.B.*, 1901-11; Robert B. Mowat, *The Life of Lord Pauncefote, First Ambassador to the United States*, London: Constable & Co., Ltd., 1929).
- REID, ROBERT THRESHIE, Earl Loreburn (1846-1932), son of chief justice of Ionian protectorate, graduated from Oxford University and admitted to Inner Temple, 1871; elected Liberal member of Parliament, 1880, and appointed solicitor-general, 1894, attorney-general, the same year, and lord chancellor, 1905. In 1880's, he dev-

- illed for Henry James (as attorney-general) but he was not an outstanding law officer or lord chancellor (*D.N.B.*, 1922-30; Heuston, *Lives of Lord Chancellors*).
- REILLY, FRANCIS SAVAGE (1825-83), graduated from Trinity College, Dublin and admitted to Lincoln's Inn, 1851; served as parliamentary draftsman until his death (Boase, *Biography*).
- ROBERTSON, CHARLES BOYD, entered Foreign Office, 1865, promoted to assistant clerk, 1881, and superintendent of treaty department, 1894-1903 (*Foreign Office List*, 1905, London, 1905).
- ROGERS, FREDERIC, Baron Blachford (1841-89), son of baronet, graduated from Eton and Oxford University and admitted to Lincoln's Inn, 1837; held a fellowship at Oxford, then took up government legal services, 1844, and appointed permanent under-secretary in the Colonial Office, 1860-71. He was a very learned lawyer and an intelligent adviser (*D.N.B.*; George E. Marindin (ed.), *Letters of Frederic Lord Blachford, Under-Secretary of State for the Colonies*, 1860-1871, London: J. Murray, 1896).
- RUSSELL, CHARLES, first Baron Russell of Killowen (1832-1900), son of merchant, admitted as solicitor, 1854, then matriculated from Trinity College, Dublin, admitted to Lincoln's Inn, 1859, and appointed queen's counsel, 1872; elected Liberal member of Parliament, 1880, appointed attorney-general, 1886 and 1892, lord of appeal, 1894, and soon afterwards became lord chief justice (*D.N.B. Supplement*; Richard B. O'Brien, *The Life of Lord Russell of Killowen*, London: Smith, Elder & Co., 1901; Gladstone MSS).
- STEPHEN, SIR JAMES (1789-1859), son of Master in Chancery, graduated from Cambridge University; appointed counsel to Colonial Department, 1813, permanent counsel to Colonial Office and to Board of Trade, 1834, assistant under-secretary in Colonial Office, 1834, and under-secretary, 1836 (*D.N.B.*).
- TWISS, SIR TRAVERS (1809-97), son of minister, graduated from Oxford University and admitted to Lincoln's Inn, 1840, and the next year to the college of advocates; during 1840s and 1850s held chairs of international law and civil law at London and Oxford universities; appointed Admiralty advocate-general, 1862, and queen's advocate, 1867-72; helped Belgian king with constitution of Independent Congo State and was appointed counsel extraordinary to Britain's delegation at Berlin Conference, 1884-85 (*D.N.B.*).
- WEBSTER, RICHARD EVERARD, Viscount Alverstone (1842-1915), son of queen's counsel, graduated from Cambridge University, admitted to Lincoln's Inn, 1868, and appointed queen's counsel, 1878; elected Conservative member of Parliament, 1885, and appointed attorney-general, 1885, 1886, 1895; appointed master of the rolls, 1900, and

the same year became lord chief justice (*D.N.B.*; Richard E. Webster, *Recollections of Bar and Bench*, London: Edward Arnold, 1914).

WILSON, SIR HENRY FRANCIS (1859-1937), graduated from Rugby and Cambridge University and admitted to Lincoln's Inn, 1888; served as private secretary to Joseph Chamberlain, 1895-97, appointed legal assistant in the Colonial Office, 1897-1900, and then went to South Africa (*Who Was Who*, 1929-40, London: A. & C. Black, 1941).

WINGFIELD, SIR EDWARD (1834-1910), graduated from Winchester and Oxford University and admitted to Lincoln's Inn, 1859; appointed assistant under-secretary in Colonial Office, 1878, and permanent under-secretary, 1897-1900 (*Colonial Office List*, 1901, London: Waterlow, 1901).

WRIGHT, SIR ROBERT SAMUEL (1839-1904), son of rector, graduated from Oxford University and admitted to Lincoln's Inn, 1865; appointed junior counsel to the Treasury, 1883; tried unsuccessfully to enter politics; appointed judge, 1890 (*D.N.B.*, 1901-11).



## Selected Bibliography

The most useful sources were the Colonial Office and Foreign Office series dealing with Africa and the Pacific—either the colonies or consular districts established there or the European countries that were interested in imperial expansion into those areas. Both collections of documents contained the correspondence between the department and the law officers or the lord chancellor. In addition the minutes and departmental memoranda by the qualified lawyers in both departments were extremely useful in showing how theoretical considerations were put into practical effect. The papers of the Lord Chancellor's Office were a miscellaneous collection, some papers on departmental organization being useful. The biggest gap in records lay in the nonpreservation of files for the law officers' department during the late nineteenth century. Their final opinions, however, were bound in the relevant Colonial or Foreign Office volumes and also were printed separately.

The private papers were not so useful for elucidating the development of theory. Their value lay more in comments upon the system of giving legal advice and in personal observations on the ability and personality of legal advisers. The more valuable private papers were those of Gladstone and Granville, among the politicians, and of Cairns and Selborne, among the lawyers. On the whole, however, the papers of the lawyers—Cairns, Halsbury, Harcourt, Jessel, and Selborne—were not very fruitful in matters of law so far as this topic was concerned. Perhaps lawyers do not like to leave permanent written records of their public endeavors.

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Foreign Office. F.O. 2 (Africa). F.O. 17 (China). F.O. 58 (western Pacific). F.O. 63 (Portugal). F.O. 64 (Germany). F.O. 69 (Siam).

F.O. 78 (Turkey). F.O. 83 (general). F.O. 84 (slave trade). F.O. 97 (miscellaneous). F.O. 107 (Zanzibar). F.O. 366 (Chief Clerk's Department).

Lord Chancellor's Office. L.C.O. 1. L.C.O. 2.

Treasury. T. 12.

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Chamberlain, Joseph MSS. Birmingham University Library.

Gladstone MSS. British Museum.

Granville MSS. Public Record Office, P.R.O. 30/29.

Halsbury MSS. Third Earl of Halsbury.

Harcourt, Sir William MSS. Viscount Harcourt.

Jessel MSS. Lincoln's Inn Library.

Meade MSS. Swansea University College Library.

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Rosebery MSS. National Library of Scotland.

Salisbury MSS. Christ Church Library, Oxford.

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- . "Correspondence Relative to the State of the Kaffir Tribes," [912], *P.P.* 1847-48, XLIII.
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- . "Correspondence and Documents Relating to the Feejee Islands, in so far as the Same Relate to Their Annexation to the Colonial Empire of this Country, or Otherwise Affording Protection to British Subjects Resident in those Islands," H. of C. No. 435, *P.P.* 1871, XLVII.
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